

PERFORMING THE COURT:  
FORMS AND PRACTICES OF LEGAL KNOWLEDGE-MAKING IN  
ARGENTINA

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PERFORMING THE COURT: FORMS AND PRACTICES OF LEGAL  
KNOWLEDGE-MAKING IN ARGENTINA

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This dissertation is about the practices of legal knowledge-making within the Argentine Supreme Court of Justice. It does not offer an analysis of judicial decisions, or the modes of legal reasoning. Nor does it further the idea of law as a problem-solving tool. Rather, it examines, in the ethnographic mode, the practices of the subjects who actively participate in the making of the law, understanding these practices as a means of crafting the law, a technique of lawmaking. Accordingly, this work provides a fine-grained description of the mundane aspect of judicial practice: the workings of the legal bureaucracy—the quotidian world of files, reports, memoranda and hearings, among others, that are quintessential instruments of legal knowledge-making practices. But yet, it brings to the surface the different sets of social relations that emerge from these practices, even from those that work on the most routine grounds.

More broadly, this project engages in an interdisciplinary method of analysis of knowledge production and circulation practices based on theoretical contributions from different areas of socio-legal scholarly concern like legal anthropology, law and society, comparative law and contemporary social thought. Science and Technology Studies' insight about the production and circulation of knowledge is particularly relevant to this work as it advances the appreciation of legal knowledge as part of a larger network of knowledge practices rather than an isolated outcome (namely, the judicial decision), or the result of the actions of a few individuals, for instance, judges.

## BIOGRAPHICAL SKETCH

Leticia Barrera López was born in the city of San Miguel de Tucumán, Province of Tucumán, Argentina. She holds an LL.B from Universidad Nacional de Tucumán, a Master in Economic Development in Latin America from Universidad Internacional de Andalucía at La Rábida, Huelva, Spain, and an LL.M. from Cornell University.

To my mother, Ebe, and Matías

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At different junctures of my fieldwork, I met people "outside" the Court, whose help contributed greatly to the development of this dissertation. Legal scholars, lawyers, human rights activists, and NGO staffers genuinely opened to me their scholarly and professional projects, their concerns about legal reform in Argentina, and even their classrooms. These interactions allowed me to observe, participate and learn about my field in many different ways. But even more importantly, they "sheltered" me at those moments when my research opportunities at the Court seemed to be foreclosed.

For financial support, I am deeply indebted to the Fulbright Commission in Argentina, which funded my master studies at Cornell. Cornell University, the Graduate School and the Law School, supported my doctoral studies, and I wish to thank Charles Cramton and Annelise Riles in particular for their commitment to secure financial continuity for this project throughout all its stages. For their help and assistance, I am thankful to Larry Bush, Charles Cramton, Donna Hastings, Dawne Peacock and Ginny Star. Donna and Dawne were always there to help me, both easing

my time at Cornell, and sorting out any kind of inconvenience that would arise when I was away.

This dissertation benefited from lively discussions held at different venues. Among them, the UC Davis Graduate Student Symposium on “The Curious Lives of Documents” in March 2007; the 2006 Law and Society Graduate Student Workshop in Baltimore; and this association’s annual meetings in Berlin in 2007, and Montreal in 2008. The American Anthropological Association Annual Meetings in 2007 in Washington, D.C.—in particular the APLA (Association for Political and Legal Anthropology) Graduate Student Workshop on Law and Science and Technology Studies, held on that occasion—and in 2008 in San Francisco, respectively, provided me with very critical audiences to discuss my project.

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whom this project engages. Mitch Lasser's fine-grained and thoughtful reading of my work, combined with his exquisite sense of humor, has helped me enormously. I remain very aware of the insights I learned from him and his forward-looking view of what scholarship should be. Muna Ndulo's friendship was one of the greatest rewards of this project. I really enjoyed our long conversations in Ithaca, through which I came to appreciate his professional and academic interests. His example has taught me beyond the limits of this academic research. Having Roberto Gargarella's guidance and advice during my research was a real treat: he carefully followed up my progress, always willing to share his time with me with attention, patience, and sensibility, while never ceasing to pose new questions.

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Last but not least, it is difficult to express my gratitude to my partner Matías Novoa Haidar in just a few words. Matias has been my most solid support, the greatest joy, and the best companion I could ever dream of in this long travel. His faith in this project, combined with his lovely mood and acute perception of reality, generously sustained me and enhanced my work at every stage. His enthusiasm to take on new challenges is the lesson that I treasure most, in particular as we move toward our next project: the coming of our son.

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## INTRODUCTION

This dissertation is about the practices of legal knowledge-making within the Argentine Supreme Court of Justice. It does not offer an analysis of judicial decisions, or the modes of legal reasoning. Nor does it further the idea that law is fundamentally a process or mechanism of dispute resolution. Rather, it examines, in the ethnographic mode, the practices of the subjects who actively participate in the making of the law, seeking to understand the legal phenomenon “from the native’s point of view,” in anthropologist Clifford Geertz’s words.<sup>1</sup> In more specific terms, it addresses judicial practice as a *technique* of lawmaking, a mode of *crafting* the law; not merely as a means to an end relationship, but as an instantiation of knowledge relations;<sup>2</sup> and yet, as itself a modality of knowing about the law.

At this point, it is worth noting that by referring to the practices observed within the Court as “lawmaking” practices, I do not intend to dispute either the normative argument or my subjects’ assumptions that in civil law regimes, such as the Argentine, judges do *not* make law. Rather, I seek to advance the appreciation of these practices as technologies of (legal) knowledge production. This dissertation, therefore, can be understood more as an ethnography of technique (or *techne*<sup>3</sup>) than as an ethnography of law’s normative discourse.<sup>4</sup>

The research project that led to this dissertation arose out of a moment of exhaustion. In the context of political instability following the 2001/2002 economic

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<sup>1</sup> Clifford Geertz, *Local Knowledge, Further Essays in Interpretive Anthropology*, 2000 edition (Basic Books, 2000), 55-70.

<sup>2</sup> Annelise Riles emphasizes Heidegger’s description of the technical “as a knowledge practice—revealing—which is not an end, but which nonetheless foreground its own means...” Annelise Riles, “Property as Legal Knowledge: Means and Ends.” *Journal of the Royal Anthropological Institute* (N.S.) 10:4 (2004): 775-795, 789.

<sup>3</sup> See: Tom Boelstorff, “Crafty Knowledges,” *The Political and Legal Anthropology Review* 31:1 (2008), 96-101, 96.

<sup>4</sup> See: Marie-Andrée Jacob, *The Match of Relatedness: Bureaucracy, Legitimation and Kinship in Organ Transplants*. J.S.D. Dissertation (Ithaca, NY: Cornell University, 2006).

crisis in Argentina, public skepticism in political and legal institutions gained momentum merging with enduring critiques about the workings of the Argentine judicial system. Issues such as transparency, accountability, and legal predictability rapidly moved to the top of the political agenda, advanced in particular by NGOs' discourse. It was my experience and reading of these events, and exhaustion of the way in which legal critique (not the critique itself) was (and still is) articulated, apparently with no chances to move beyond a "speaking truth to power rhetoric,"<sup>5</sup> that triggered my interest in the subject of this study. In this sense, this dissertation is a reaction: it tries to keep the project away from the contingencies of the field and assumptions about the subject; in other words, from the temptation of taking a normative stance toward judicial practice. As anthropologist Lawrence Rosen observes: "the task is to sort out these influences [the full range of historical factors that shape people's lives] and to see how, given the particular issue under study, a balanced apportionment of the contributing factors best account for the matter at hand."<sup>6</sup> As a matter of fact, this dissertation does not present a focused analysis of the post-crisis context in which my subjects' practices develop, but certainly it remains latent in the background of my work. But in another sense, this dissertation becomes a response: it offers a different modality of knowing about law; thus, it opens up different possibilities for the critical project.

This project engages in an interdisciplinary method of analysis of knowledge production and circulation practices based on theoretical contributions from different areas of socio-legal scholarly concern like legal anthropology, law and society, comparative law and contemporary social thought. Science and Technology Studies'

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<sup>5</sup> See, generally: David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).

<sup>6</sup> Lawrence Rosen, *The Anthropology of Justice. Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989) 5.

insight about the production and circulation of knowledge is particularly relevant to my work as it advances the appreciation of legal knowledge as part of a larger network of knowledge practices rather than an isolated outcome (namely, the judicial decision) or the result of the actions of a few individuals (judges). Additionally, at different moments of this research I rely on a series of insightful works drawn from the above fields. Among them, the works of Bruno Latour, Rolland Munro, Adam Reed, Annelise Riles, Marilyn Strathern, Mariana Valverde, Cornelia Visman, and Barbara Yngvesson, constitute a coherent chain of authority to back my claims.

### ***Beyond Law's Ends***

As initially framed, my project aimed to shed light on how different legal experts—or holders of different types of juridical capital, following Pierre Bourdieu—interacted in the practice of judging and the institutional construction of legal “truth.” In Bourdieu’s view, the content of the law that emerges from judgment is shaped through power relations articulated among holders of different types of juridical capital (judges, legal scholars, professionals) that converge in a “juridical field,” which, driven by its own logic, operates like a disciplined and professionally hierarchized “apparatus.”<sup>7</sup> This insight seemed particularly relevant to my project’s law and society approach, which shared classical realism’s long-standing assumption of a gap between “law on the books” and “law in action.”

However, after several months of trying to gain “formal” access to the Court—a formality compelled by Cornell’s IRB policy—I found myself holding nothing more than a bundle of scattered sheets: my *dossier*. This encounter reshaped my entire conception of the project, as I found myself at the intersection of the workings of two different bureaucracies: the Cornell IRB, on the one hand; and the Court, on the other.

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<sup>7</sup> Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” *Hastings Law Review* 38 (1987) 805-53.

In other words, I was able to get “inside” the institution in an unexpected way: my research project itself was turned into a file, a Court dossier; and, as such, it would be reviewed and decided upon according to the rules and procedures that regulated the Court’s decision-making. Indeed, that encounter materialized a new subject of inquiry, the file or dossier, which, in turn, drove my attention toward an unanticipated subject: the Court as a bureaucratic body, in the Weberian sense, and its commonsensical knowledge practices.

This ethnographic finding is not a novel one. It replicates a constellation of anthropological projects that have taken up documents, themselves objects of modernity, as salient devices—*artifacts*—that make it possible to explore and understand the modern subject in multiple domains of current anthropological inquiry, “from law to science, to the arts, religion, activism, and market institutions.”<sup>8</sup> Moreover, building upon Marilyn Strathern’s insight, Annelise Riles argues that the artifact is what the ethnographer looks for in the field.<sup>9</sup> Nevertheless, if I look back at my initial approach to the Court’s workings I find this overlooking of bureaucracy (understood as a knowledge practice in itself) to be part of the ordinary reaction of a socio-legal project’s inquiry into legal knowledge. Indeed, socio-legal scholarship tends to approach law through more traditional subjects such as “legal norms, legal processes, legal institutions, actors, or even languages.”<sup>10</sup> In doing so, the more mundane and routine aspects of lawmaking practices are often ignored or taken for

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<sup>8</sup> Annelise Riles, “Introduction: In Response,” in *Documents: Artifacts of Modern Knowledge*, Annelise Riles ed. (Ann Arbor: University of Michigan Press, 2006), 1-38, 4.

<sup>9</sup> [An artifact] “is something one treats *as if* (Leach 1986 (1954)); Vaihinger & Ogden 1924; Wagner 1986) it were simply a found object in the world. And yet, it is by definition always the artifact of ethnographic work as much as a found object. Specifically, it is the fruit of the ethnographic effort of working through one’s theoretical concerns not by deductive analysis but laterally, through the ethnographic apprehension of, or empathy for others’ analytical concerns.” (italics in the original). Ibid. 16-7.

<sup>10</sup> Annelise Riles, “Comparative Law and Socio-Legal Studies,” in *The Oxford Handbook of Comparative Law*, Mathias Reimann and Reinhard Zimmermann eds. (Oxford: Oxford University Press, 2006), 775-813, p.804.

granted—not only by socio-legal scholars but also by judicial bureaucrats themselves. Indeed, for the most part, forms, procedures, and everyday administrative practices on which the work of legal institutions rest, appear too technical and monotonous to be worth approaching from a theoretical perspective. Yet, borrowing Science Studies' terminology, one might say that these tools of bureaucracy on which the workings of law rest—in this particular case, the organizational and communicational role that written records play within the judicial apparatus—become somewhat “blackboxed”<sup>11</sup> by socio-legal scholarship's emphasis on the social forces and power relations at play in different legal arrangements.<sup>12</sup>

In this vein, Annelise Riles observes that scholars who engage in humanistic legal studies, the “culturalists”<sup>13</sup> as she calls them, find the technical dimensions of law or “legal technicalities”—legal instrumentalism, managerialism, procedures, legal technocrats, and the forms of legal doctrines, among others—too “mundane” and “profoundly uninteresting” to require investigation.<sup>14</sup> Indeed, these scholars see legal instruments more as part of “the realm of practice than to theory,”<sup>15</sup> and hence, “non-strategic” for critical socio-legal scholarship.<sup>16</sup>

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<sup>11</sup> In Science Studies, “blackboxing” is used to indicate the social process through which the joint production of actors and artifacts becomes entirely opaque by its own success: “When a machine runs efficiently, when a matter of fact is settled, one needs to focus only on its inputs and outputs and not in its internal complexity. Thus, paradoxically, the more science and technology succeed, the more opaque and obscure they become.” See: Bruno Latour, *Pandora's Hope: Essays on the Reality of Science Studies* (Cambridge, MA: Harvard University Press, 1999), 183; 304.

<sup>12</sup> See Annelise Riles, “Comparative Law,” 806-8; “A New Agenda for the Cultural Study of Law: Taking on the Technicalities,” *Buffalo Law Review*, 53 (2005): 973-1033; Mariana Valverde, “Jurisdiction and Scale: ‘Legal Technicalities’ as Resources for Theory,” paper presented at the Law and Society Annual Meeting, Montreal, May 29-June 1, 2008. Unpublished manuscript, on file with the author.

<sup>13</sup> Among them, “...constitutional theorists, legal historians, law and society scholars, jurisprudes and legal philosophers, literary theorists, feminists, anthropologists, critical race scholars.” See: Annelise Riles, “A New Agenda for the Cultural Study of Law: Taking on the Technicalities.”

<sup>14</sup> Ibid, 976.

<sup>15</sup> Ibid, 974.

Similarly, Riles argues that for those scholars who share a more instrumentalist approach to law: the “instrumentalists” (economists, political scientists, doctrinalists, cognitive scientists, corporate lawyers, etc.) the technical character of law is relevant only insofar they are useful to solve actual legal problems. That is to say, both approaches to law—the culturalist and instrumentalist—overlook the



Along the same lines, Mariana Valverde argues critically that “Law is usually examined by critical legal studies and socio-legal scholarship as a key site for the reproduction and contestation of various forms of power relations.” However, she notes, “if power works through knowledge, it should prove useful to undertake the examination of some legal events that highlights the knowledge dimension.”<sup>17</sup> In Valverde’s project, this means to observe the constitution, contestation, and circulation of certain sets of truths within legal arenas “through and in” the work of some legal actors, namely state officials, lawyers and judges.<sup>18</sup> Riles’s research agenda, for its part, urges culturalist legal scholars to shift their attention to the core aspects of legal thought, that is, to the legal technicalities, and hence to turn them into objects of humanistic inquiry:<sup>19</sup> “Indeed, it is precisely the commonsensical quality of the thing that makes the lawyer’s love of tools an appropriate point of entrée for an ethnographer into contemporary law and institutions.”<sup>20</sup>

But what ethnographic possibility do these tools offer? Moreover, how can the researcher “appropriate” these instruments of legal knowledge-making and turn them into analytical constructs, artifacts of her own knowledge? The subject, as in any other anthropological project, poses methodological, epistemological and political challenges to the ethnographer’s representational strategies. Like a piece that is re-created for others’ view, the object of study demands the researcher to take on responsibilities. How to keep one’s account “faithful” to the body of the object that

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quintessential feature of law, “what makes law as opposed to literature, or economics or cognitive science: the technicalities of legal thought.” Ibid. 974-5

<sup>16</sup> Ibid., 976.

<sup>17</sup> See: Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003) 1.

<sup>18</sup> Ibid.

<sup>19</sup> See: Riles, “A New Agenda for the Cultural Study of Law,” 1033; “The Anti-Network: Global Private Law, Legal Knowledge, and the Legitimacy of the State,” *American Journal of Comparative Law* 56:3 (Summer 2008) 605-30

<sup>20</sup> See Annelise Riles, “Introduction. Making Sense of the Means: Private Governance and the Legal Technologies of Collateral,” *In Collateral Knowledge: Legal Reason in the Global Financial Markets* (forthcoming).

the analysis penetrates? What version of the object should the ethnographer construct (or re-construct)? What are the artifacts of her intellectual work? Ethnography, in its conventional notion within anthropology, forged in Malinowski's tradition, "implied that a culture or society could be captured in an assemblage of domains (economy, magic, family, etc)."<sup>21</sup> Anthropological writings, notes Clifford Geertz, are themselves interpretations, and thus, fictions—in the sense that they are "something made," "something fashioned," "not that they are false, un-factual or merely "as if" thought experiments."<sup>22</sup> Geertz embraces an interpretive view of culture:<sup>23</sup> data, he argues, "are really our own constructions of other people's constructions of what their compatriots are up to...."<sup>24</sup> In Geertz's understanding, "Man is an animal suspended in the webs of significance he himself has spun," and culture is those webs whose meaning can be analyzed through a process of interpretative and microscopic "thick description:" ethnography.<sup>25</sup>

Indeed, Geertz's view of ethnography as a "thick description" extended well beyond the disciplinary boundaries. Yet, scholars in other fields (as in my own case) have embraced ethnography in an effort to make sense of the particularities of local, cultural realities of individuals, acts, objects, and utterances.<sup>26</sup> However, at the same

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<sup>21</sup> Markus Schlecker and Eric Hirsch, "Incomplete Knowledge: Ethnography and the Crisis of Context in Studies of Media, Science and Technology," *History of the Human Sciences* 14:1, 69-87, 70.

<sup>22</sup> Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books) 15.

Along the same lines, James Clifford argues that "Even the best ethnographic texts – serious, true fictions – are systems, or economies, of truth." James Clifford, "Partial Truths," in *Writing Culture, The Poetics and Politics of Ethnography*, James Clifford and George E. Marcus eds. (Berkeley: University of California Press, 1986) 1-26, 7.

<sup>23</sup> This is not to say that culture is an "out-there" totalizing whole, "a self-contained "super-organic" reality." Geertz, *The Interpretation of Cultures*, 11. On the contrary, anthropologists have long rejected a holistic conception of culture. See, e.g.: Sally Engle Merry, "Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)," *The Political and Legal Review* 26:1 (2003), 56. Annelise Riles, "Comparative Law and Socio-Legal Studies," in *The Oxford Handbook of Comparative Law*, Mathias Reinman and Reinhard Zimmerman (eds.) Oxford: Oxford University Press, 776-813, 798-9.

<sup>24</sup> Geertz, *The Interpretation of Cultures*, 9.

<sup>25</sup> Ibid., 6, 20-21.

<sup>26</sup> For instance, Schlecker and Hirsch note that the turn toward ethnography by media and cultural studies (MCS) and science and technology studies (STS) scholars resulted in a crisis of context in these

time that other disciplines become even more enthusiastic about ethnography, anthropology poses questions to the method which the discipline itself gave birth.<sup>27</sup> After the internal critiques in the 1980s, the limits of conventional fieldwork have become even clearer; but, however, as Riles notes, “the question of what ethnography should *become*,” in light of this self-criticism, “still remains out of focus” (italics in the original).<sup>28</sup> In Bill Maurer’s words: “The reflexive turn tended to query the “I” but not the “there” in the old textual formulas establishing the ethnographer’s presence in the field.”<sup>29</sup>

In what appears to be a radical shift from conventional ethnographic practices that traditionally have kept the anthropologist and her subjects as analytically separated units, current proposals focus on the working parallels between anthropologists’ own representational practices and those of their subjects.<sup>30</sup> This, in turn, redefines the character of the relations between the ethnographer and the people she encounters in the field, moving away from the traditional model of researcher-informant relation to a more collaborative schema<sup>31</sup> of “intellectual partners in

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disciplines. If the increasing use of the ethnographic method in various fields responded to scholars’ need to contextualize their subjects’ practices in everyday settings, the effect was, at least in MCS and STS, the attempt to reach ever more extensive contextualization: “It became ever more apparent that any perspective was simply a perspective on another perspective or relation to another relation. The debates effected a fundamental epistemological uncertainty about a given ‘essence’ of individuals and things before all perspectives or contexts: i.e., before all sense making.” Schlecker and Hirsch, “Incomplete Knowledge,” 71.

<sup>27</sup> See: Annelise Riles, “Introduction: In Response,” 2-3.

<sup>28</sup> Ibid., 3.

<sup>29</sup> Bill Maurer, *Mutual Life, Limited: Islamic Banking, Alternative Currencies, Lateral Reason* (Princeton, N.J.: Princeton University Press, 2005), 12. See, also: Aaron Turner, “Embodied Ethnography. Doing Culture,” *Social Anthropology* 8:1 (2000) 51-60.

<sup>30</sup> See, e.g., Annelise Riles, *The Network Inside Out* (Ann Arbor: The University of Michigan Press, 2001); “Real Time: Unwinding technocratic and anthropological knowledge,” *American Ethnologist* 31:3 (2004) 392-405; Hirokazu Miyazaki and Annelise Riles, “Failure and Endpoint,” in *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems*, Aihwa Ong and Stephen J. Collier, eds. (Malden, MA: Blackwell Publishing, 2005), 320-331; Douglas R. Holmes and George E. Marcus, “Cultures of Expertise and the Management of Globalization: Toward the Re-functioning of Ethnography,” in *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems*, Aihwa Ong and Stephen J. Collier, eds. (Malden, MA: Blackwell Publishing, 2005) 235-62, 236.

<sup>31</sup> See, Annelise Riles, “Introduction: In response,” 4.

inquiry.”<sup>32</sup> Yet, the mere demonstration of contemporary connections or affinities between the ethnographer’s and her subjects’ practices, Marcus argues, stands itself as a critical statement against conventional efforts that sustain distanced and separated domains that the modernist insight about global integration nonetheless brings together.<sup>33</sup> This is not to say that globalization lays out *per se* a realm of commonalities between the ethnographer and her subjects; rather, it represents the frame within which new anthropological problems are presented: in assemblages, uneasy and unstable relationships; across diverse social and cultural situations and spheres of life.<sup>34</sup> The insight invites anthropologists to rethink not only anthropological inquiry, but also social inquiry in general, as this latter practice “defines itself in relation to the adequacy of its representations, its abstractions, to a reality that supposedly precedes it.”<sup>35</sup>

Anthropologists have reflected on their representational strategies, and moved, in Riles’s words, “not straight on, in the guise of critique or self-reflexivity, but laterally, that is, ethnographically”.<sup>36</sup> Thus, the anthropologist moves between their subjects’ practices and her own by treating the former as if the latter. This way of knowing culture has become known in anthropology as “lateral thinking,”<sup>37</sup> or more recently, “lateral reason.”<sup>38</sup>

[...] rather than treat culture as a thing “out there” to be  
studied with “our scientific tools here” they try to know

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<sup>32</sup> Holmes and Marcus, “Culture of Expertise and the Management of Globalization”

<sup>33</sup> George Marcus, *Ethnography Through Thick and Thin* (Princeton, N.J.: University Press, 1998), 69.

<sup>34</sup> Stephen J. Collier and Aiwa Ong, “Global Assemblages, Anthropological Problems,” in *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems*, Aiwa Ong and Stephen J. Collier, eds. (Malden, MA: Blackwell Publishing, 2005) 3-21.

<sup>35</sup> Bill Maurer, “Mutual Life, Limited,” xiv.

<sup>36</sup> Riles, “Introduction: In Response,” 7.

<sup>37</sup> Annelise Riles, “Cultural Conflicts”. *Law and Contemporary Problems* no. 71: 3 (Summer 2008): 273-308, 300. See, generally, Roy Wagner, *The Invention of Culture*, Revised and Expanded Edition (Chicago: The University of Chicago Press, 1981).

<sup>38</sup> Bill Maurer, *Mutual Life, Limited*.

the world (“here” or “there”) by thinking through familiar problems “as if” through others’ knowledge devices. Rather than describe the “other” as an object of study, these analyses draw from such others a method of investigation.<sup>39</sup>

My investigation of judicial decision-making practices builds upon the lessons of anthropology’s move toward laterality by working through the artifacts of knowledge that are proper to my own subjects, and, as such, are capable to replicate their movements and shapes. Indeed, my encountering of lawmaking practices in the field has been through the mundane forms of bureaucratic knowledge, beginning with “legal looking” documents, such as informed consent forms; and continuing with piles of dossiers that circulate within the tribunal, memoranda, reports, appeals; as well as other instruments of judicial reasoning, such as hearings that are quintessential to the making of law on a daily basis. Drawing on the aesthetics of these legal forms and their informational content, my work seeks to render visible the relations of knowledge that these instruments of lawmaking elucidate within the judicial apparatus. What is more, at different junctures, I take these mundane tools of legal reasoning as if they were analytical categories to advance my own knowledge of the subject,<sup>40</sup> thus, furthering the aesthetics of instrumentality—the means and ends relationship—embedded in these instruments.<sup>41</sup> The move, therefore, is both methodological and epistemological. It also replicates, to some extent, what Annelise

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<sup>39</sup> Riles, “Cultural Conflicts”, 300.

<sup>40</sup> Here, I draw on Annelise Riles’s insight that the forms of bureaucratic practices while contributing to an understanding of contemporary institutional knowledge become themselves theoretical categories of anthropological knowledge. See: Annelise Riles, *The Network Inside Out* (Ann Arbor: The University of Michigan Press, 2001), 16-17; *Collateral Knowledge: Legal Reason in the Global Financial Markets* (forthcoming).

<sup>41</sup> See: Annelise Riles, “Property as Legal Knowledge: Means and Ends.”

Riles has called the “literalization” of the Realist metaphor; that is, the Realist insight about the instrumental nature of law is itself fashioned as an actual instrument.<sup>42</sup>

Accordingly, this dissertation is articulated on four different artifacts: *place*, *documents*, *subjects*, and *performance*. First, place seems to be indispensable to situate my fieldsite, but neither in purely physical nor symbolic terms. Indeed, the notion of the judicial space developed in this dissertation challenges the representation of judicial practice as a phenomenon constrained within a delimited site. In so doing, it sheds light on the articulation of the judicial space through the subjects’ senses of mobility and access perceived within the Court; as well as on the institutional efforts to re-state the order disrupted by these practices. Documents, for their part, play a crucial role in my analysis. They propose a somewhat different possibility for socio-legal studies by moving the analysis beyond the ultimate results of the judicial process, judgment, and focusing, instead, on the means; that is to say, on what lies before the law’s ends. The movement toward the means furthered by the analysis of legal documents also entails shifting the attention back to the subjects that elaborate these documents who nonetheless remain often “behind the scene” if the study of the law favors a focus on legal decisions and the judges’ behaviors. Finally, performance, as used in my work, helps enact another dimension of legal knowledge-making: a “staged for an audience” aspect through which mundane bureaucratic instruments of legal procedure, like hearings, and of judicial administration, such as Court’s bylaws and other institutional documents, also can be appreciated as political tools, and thus, as the means to advance the different agendas of the actors who converge in the judicial space.

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<sup>42</sup> Annelise Riles, “A New Agenda for the Cultural Study of Law: Taking on the Technicalities,” 1009.

### ***Chapter overview***

In the first chapter I replicate in general terms my access to the Court by working on the spatial arrangements that I observed within the institution. My account focuses not only on my direct observation of the daily dynamics of the judicial apparatus, but, more importantly, on particular moments in which the judicial institution is instantiated through my subjects' notions and senses of place. The chapter lays out a set of metaphors of space and place through which judicial actors and socio-legal scholars imagine and re-create the judicial apparatus. Either explicitly or implicitly, I also build upon these metaphors to advance my own description of the Court's spatiality. However, in working on these crude metaphors of space, I also question the commonplace representations of the judicial space that they further (i.e. hierarchy, status, enclosure) by providing a description of the most routine aspects of the Court's own social dynamics. The chapter's main argument advances the idea that the notions and senses of places that I encountered in the field are actually practices that work to create and perform the judicial apparatus, and hence make up the legal phenomenon as much as the documents, circulation of files, public hearings and legal bureaucrats' documentary practices that I encountered in my fieldsite. Additionally, the chapter elaborates on the aesthetics of restoration, prompted in my field by the scene of the ongoing restoration of the Court's building, to suggest the tensions that arise out the efforts to re-construct judicial authority.

Chapter Two builds upon an anecdote from the field: it recounts how the introductory letters and informed consent forms that I brought to the field in fulfillment of Cornell University policy on the use of human subjects in research were turned into a Court dossier. The anecdote offered to me a unique opportunity to explore the rationality embedded in these surfacing and quintessential artifacts of bureaucratic knowledge such as legal forms—specifically, the judicial dossier. Far

from considering the practices of file-making that unfolded in my field as an exceptional instance of research, I take advantage of the ubiquitous character of these practices, and turn the found dossier into my own artifact; that is, as both my point of entry into my subjects' practices and analytical tool. In so doing, my field site can be apprehended ethnographically. This chapter also lays out one of the main arguments of this dissertation: legal knowledge can be accessed by not only its ends, for instance courts' decisions and their interpretations of particular facts and rules, but also through its own means, that is, the mundane and routine instruments of bureaucratic knowledge through which lawmaking is performed.

Chapter Three elaborates further on this argument. Again, I build upon the materiality of the file or dossier to examine the forms of the figures that create these files, in particular law clerks. These figures are typically perceived and portrayed as impersonal and interchangeable in the bureaucratic logic. Nonetheless, as these subjects' documentary practices unfold, they render them visible in different forms, though not always accessible to outsiders. Persons are displayed through a bureaucratic circuit of files that simultaneously furthers and denies human agency while reinforcing the division of labor within the institution. These dynamics, I argue, can be understood in light of Marilyn Strathern's insights about the forms of objectification and personification that operate in two "ethnographically conceived" social domains: a Euro-American commodity-driven economy and Melanesia's economy based on gift-exchange.

Chapter Four provides a detailed look at the mode in which the Argentine Supreme Court exercises its power to decide what cases to review and what cases to discard, a mechanism that, it is argued, borrows from the United States Supreme Court's writ of certiorari. Nevertheless, I do not seek to draw in this chapter a comparative analysis between how the practice of the certiorari is performed in these



two different jurisdictions. Rather, I focus on the form that this practice of gatekeeping assumes in the Court and its implications as an act of definition of law by the exclusion of “garbage cases” from the sphere of cases that deserve judicial attention. Additionally, I suggest the effects of this exclusion upon the construction of judicial authority.

Chapter Five draws on the aesthetics of public hearings at the Supreme Court. It looks at a particular set of hearings that the Court held for a case that involved the pollution of one of the most populated industrial urban areas in Argentina. Noticeably, the hearings, themselves instruments of legal knowledge-making, also may become powerful displays of the conceptions of place that I encountered in the Court and described in the first chapter. In fact, as the chapter shows, not only hearings but also legal Court documents, such as bylaws, can be turned into objects of performance, and, as such, political tools. The chapter brings a detailed look about how these practices build upon technologies of transparency, which, in turn, work to render the institution (and the Justices) visible to both particular audiences and to the larger public. Additionally, I examine the effects that said visibility has on different legal actors such as the litigants, NGOs, and the Court itself.

In the conclusion, I reiterate the *law in the making* dimension furthered in this dissertation. I also recapitulate the findings of the previous chapters in light of the artifacts on which I draw my analysis. In taking these artifacts together in this section, I seek to show how they enable two levels of analysis of judicial practice, one intrinsically related to the other. More broadly, in the conclusion I seek to demonstrate how an account of judicial practice whose shape replicates the forms in which this practice is articulated produces a new insight on judicial decision-making by broadening the understanding of legal knowledge formation.

## CHAPTER 1

### LOCALIZING THE JUDICIAL SPACE

What I first noticed upon my arrival to the Supreme Court in August 2005 to conduct field work was that the façade of the so-called “Palacio de Tribunales” (Tribunal Palace) or just the “palacio,” the Supreme Court’s house, was being restored. In 1995, after noticing that the building façade was seriously damaged, and that many parts had already collapsed, a project for consolidating the entire building was implemented. The restoration process began in 1997 and would continue for a few more years.<sup>43</sup> In 1999, a presidential decree declared the Court’s house a “National Historic Monument.”<sup>44</sup>

The preservation and conservation works of the *palacio* were preceded by a series of proofs which consisted of diagnoses of the status of materials, damages and other pathologies affecting the building; the observation of the reaction of the replacement materials by the remaining originals; and the cleaning systems for the façade. Above all, declared Court’s preservationists, they sought not to compromise the building’s original materials.

Restoration, as a technology of architectural conservation, involves more complex decisions than repairing a piece of work or re-establishing its original state or appearance. It implies both aesthetic and ethical commitments and attitudes toward the object of restoration. Different approaches throughout history account for ongoing debates about the subject. Restoration, it has been argued, may be destructive,

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<sup>43</sup> La Nación, Suplemento de Arquitectura, “Las acciones de preservación en los edificios de la Justicia,” [http://www.lanacion.com.ar/archivo/nota.asp?nota\\_id=208994&origen=acumulado&acumulado](http://www.lanacion.com.ar/archivo/nota.asp?nota_id=208994&origen=acumulado&acumulado), (accessed October 27, 2007).

<sup>44</sup> Decree No. 349, April 15 1999, B.O. April 20, 4

conservative or eclectic, whether it is aimed at preserving nothing of the original building, or conserving everything down to particular period; or yet, whether the same restoration endeavor seeks to restore sometimes, or to remodel other times.<sup>45</sup>

To restore has been interpreted as to revive the object to its original appearance, which, in fact, might also produce an ideal state that it had never enjoyed in the first instance:<sup>46</sup> “it is impossible, as impossible as to raise the dead, to restore anything that has ever been great or beautiful in architecture,” declared John Ruskin,<sup>47</sup> advocating for a moderate attitude in restoration, and hence suggesting that restoration should refrain itself from any attempt that would go beyond preserving from further injuries.<sup>48</sup> Restoration, in this sense, would become “protection”; and maintenance, for its part, should be performed only by means that were meant for supporting and covering, with showing “no pretence of other art.”<sup>49</sup>

Nevertheless, as Harold and Marion Meek point out, a more ethical approach to the object in a restoration project does not necessarily ensure an aesthetically pleasant result. In this respect, other ethical concerns may arise: what should be given priority? A full visual record, even though it implies resorting with artificial materials?; to the careful reconstruction of every stone? Should restoration be focused on ‘façadism’, and hence to preserve only the street frontage in the belief that only the façade of a building is part of public domain? And yet, in many cases, preservation means to assign a building a use different from that one it was originally conceived to perform. Adaptive reuse, note Harold and Marion Meek, has become the key for the

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<sup>45</sup> Harold and Marion Meek, “Architectural Conservation and Restoration,” in *Grove Art Online* (Oxford Art online), available at <http://www.oxfordartonline.com/public> (accessed September 28, 2008).

<sup>46</sup> Ibid.

<sup>47</sup> John Ruskin, *The Seven Lamps of Architecture* (London, 1849), cited in Meek, “Architectural Conservation and Restoration.”

<sup>48</sup> Ibid.

<sup>49</sup> William Morris, *To the Workingmen of England*, (Manifesto, 1877), cited in Meek, “Architectural Conservation and Restoration.”

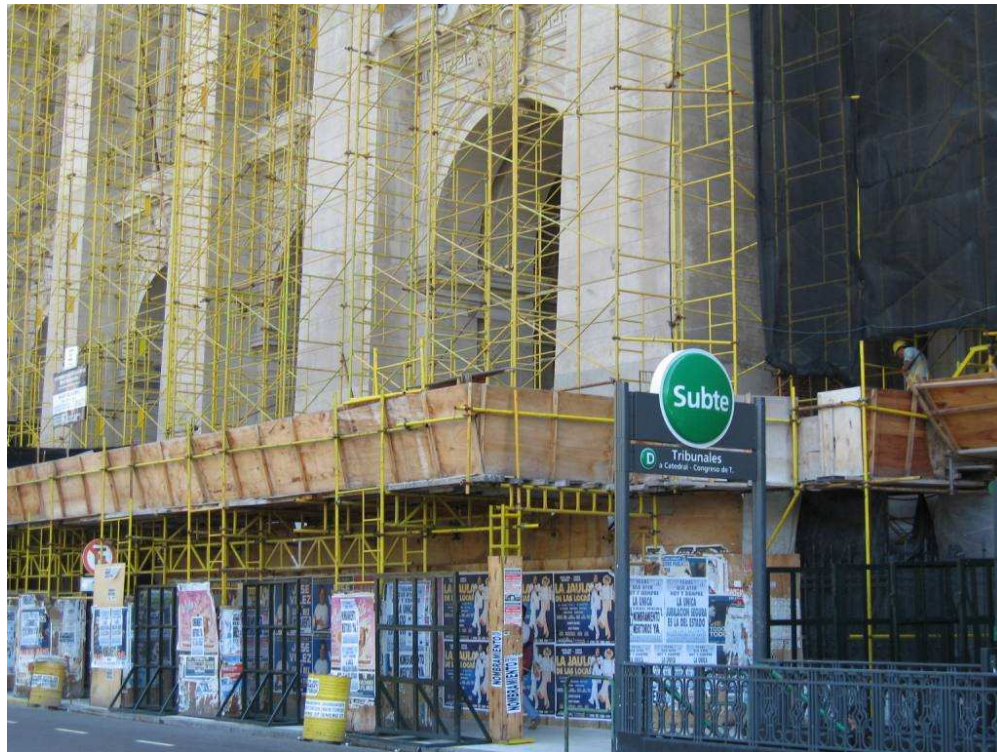
conservation of many buildings, even when new activities might force the building to face ideological opposition; that is a use completely different from which the building was originally conceived.

Architectural conservation debates in late 20th century, explain these two authors, were summarized in the so-called Venice Charter drafted at the International Congress for Conservation held in 1964 in Venice; where the International Council on Monuments and Sites (ICOMOS) was launched to promote the conservation principles of the Charter. The document has been accepted by many countries, but yet it lacks legal standing, which paved the way to widely varying interpretations of its text. And, also importantly, principles that are applied in restoration of archeological sites might not work for buildings that are currently in use. In sum, the complex scenario of a restoration project suggests that any restoration manifesto should yield to concrete experiences and particular objects, as each piece may pose unique ethical and aesthetic dilemmas to its own restoration process.

My interest in these debates on restoration was triggered by my daily observation and experience of the Supreme Court's façade restoration. Not only did the restoration workings dominate the landscape but they also modified it affecting the movements of those who interacted within the judicial apparatus (Figures 1 and 2). The front access to the building, for instance, was constantly moved away according to the physical needs of the restoration project, thus, confusing people as to where they should access the *palacio*.



**Figure 1. Front façade of the *Palacio de Tribunales*  
(February 2, 2006)**



**Figure 2. Restoration workings on the *Palacio*'s façade  
(January 31, 2007)**

Indeed, throughout my fieldwork, I was able to see partial results of the restoration process as different parts of the façade were gradually uncovered to the public, revealing delicate details of the building's original architecture. Until January 2008, these details remained unnoticeable; first, because of the aged aspect of the building; and, later, once restoration was underway, due to the scaffolding and veil that covered the façade to protect both workers and passersby. In fact, the building which I first entered in late August 2005 looked very different from the one I left behind in March 2007 when I finished my fieldwork. And yet, when I visited the Court last summer during my follow-up research, the same building looked even more renovated. In this lapse, conservation workings managed to imprint a light and vivid appearance to the old and opaque *palacio* across Lavalle square ("Plaza Lavalle") in downtown Buenos Aires.

My appeal to the forms of restoration may be viewed here as a way of setting the stage on which legal practices are performed. More than describing a physical place, namely the “judicial palace,” it seeks to convey the forms in which the judicial institution gets negotiated in this space. To me, my field site often melted into the landscape of the restoration of the *palacio*. Thus, as in any other process of restoring a building, ethical and aesthetic dilemmas developed toward the object that, in my subjects’ view, seemed to be restored: the Court’s authority.

When Argentina’s economy collapsed in December 2001, the Supreme Court also became a recurrent target of massive demonstrations held against the economic policy of the then President De la Rúa (1999-2001). In the eyes of a largely disenchanted public, especially middle-class depositors, the Supreme Court Justices appeared as co-responsible for the country’s debacle. Additionally, in the context of political instability following the economic crisis, public skepticism in political and legal institutions increased and themes of transparency (*transparencia*), accountability, and legal predictability (*seguridad jurídica*) gained momentum, mostly as part of NGO discourse. Specifically, with respect to the judiciary, NGOs’ critiques of the Court were materialized in reports, public campaigns and long-term judicial reform projects articulated through a sort of “Speaking Truth to Power” rhetoric<sup>50</sup> aimed at impacting the Court’s workings. Principally, contemporary demands of Argentine NGOs called for the opening up of judicial decision-making to include citizen participation.<sup>51</sup> Yet, simultaneously to these demands for change, four new Justices were appointed (out of the seven who currently preside on the bench) in the period of 2003-2005, which meant a substantial change in the composition of the

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<sup>50</sup> See, generally: David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).

<sup>51</sup> Nevertheless, to a large extent, these demands capitalized numerous scholarly critiques of the Court’s behavior in the last fifteen years. See Chapters Three and Five of this dissertation.

Court.<sup>52</sup> In this context, the image of an ongoing institutional change in the Court emerged and advanced, significantly, by a rhetoric of change articulated not only by the Court's Justices, but also by opinion-making institutions, among them NGOs, and the media.

### ***Disruption and Continuity***

It is worth noting that the juxtaposition of legal forms with other forms of culture (as in this case, with the forms of restoration) on which I rely here is not a claim of direct correlation or influence;<sup>53</sup> rather, it is just an exercise in thinking about legal practices through the appropriateness of forms.<sup>54</sup> Restoration holds the promise that everything will be perfect in the future; but meanwhile, everything is a mess,<sup>55</sup> that is, the present appears chaotic and impractical. On the one hand—and probably more palpably felt—is this idea of “messiness,” as suggested by the restoration workings, that I attempt to capture in this chapter through the description of my own ethnographic access to the Court's building. In focusing on its spatial aspects, such as infrastructure, appearance, internal distribution, as well as the daily dynamics of its social space, I seek to bring to the forefront the actual appearance of the Court's site. The image of my account suggests a dysfunctional space (and institution). However, this image is neither a novel nor surprising one. Indeed, it reflects a perception of the judicial space currently shared by both legal experts (lawyers, legal scholars, NGO staffers, and even judges) and laymen, such as litigants and spectators. This view, for instance, is epitomized in the general store metaphor which Supreme Court Justice

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<sup>52</sup> These new vacancies were opened in the Court as a result of several resignations and impeachment proceedings against the so-called “Menem's Court.” See Chapter Three of this dissertation.

<sup>53</sup> Nathaniel Berman, “Modernism, Nationalism, and the Rhetoric of Reconstruction,” *Yale Journal of Law and Humanities* 4 (1992): 351-380, 352.

<sup>54</sup> See: Marilyn Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things* (London & New Brunswick, NJ: The Athlone Press, 1999). See, also: Annelise Riles, *The Network Inside Out* (Ann Arbor: The University of Michigan Press, 2001).

<sup>55</sup> I am thankful to Annelise Riles for this observation.



Carlos Fayt drew upon in response to a group of journalists who asked him about his colleague Justice Belluscio's resignation from the Supreme Court in June 2005: "the Court has become a general store" ("la Corte se ha convertido en un almacén de ramos generales"),<sup>56</sup> the judge replied, giving voice, in plain language, to critiques of the Supreme Court's becoming everything *but* a highly specialized tribunal. Seen in this light, the Court, like a town's general store where the people purchase their general goods, has become the place where virtually any kind of judicial conflict can be heard, in direct contradiction with the constitutional mandate that grants the Court exceptional jurisdiction and status of a state power.<sup>57</sup>

On the other hand, at a more critical level, I appeal to the notions of preservation and resistance implicit in restoration's promise to suggest the tensions that arise between the daily dynamics of the judicial space and a specific and settled representation of judicial practice as a localized and detached phenomenon. In my opinion, this latter representation yields *vis-à-vis* the concrete senses of mobility, and even disruption at work within the contemporary judicial space; though it is nonetheless constantly re-enacted by institutional practices that tend to "naturalize" any disruption to the judicial order. Borrowing from Guillaume Ratel's material on the *Parlement of Toulouse*, I would like to argue that this image of the judicial institution—readily accepted as that of the Court itself—identifies this body with only some particular functions and practices: "those that manifest most clearly the sovereign attributions of the court."<sup>58</sup> These are the activities underlying the accounts of many of my interlocutors at the Court, who claim for the Court "to regain

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<sup>56</sup> See Clarin, "Fayt dice que la Corte se ha convertido en un almacén de ramos generales," <http://www.clarin.com/diario/2005/06/08/um/m-991609.htm> (accessed December 14, 2007).

<sup>57</sup> See Chapter Four of this dissertation.

<sup>58</sup> Guillaume Ratel, "*Subjects by Law: The Judicial Practices of the Magistrates of the Parlement de Toulouse (1550-1715)*" (PhD dissertation, in progress, Cornell University).

legitimacy,” to assert its role “as a real state power,” to act as “a check of both the Congress and the Executive,” and to behave as a “co-governance body.”<sup>59</sup>

In Ratel’s account, the representation of the *parlement* (the court), was restricted to the activities that took place in a particular room, the *Grande Salle d’Audience*.<sup>60</sup> As he argues, this representation of the *parlement* was actually the one “that the *parlementaires* sought to give of themselves”; indeed, a “self-representation” that endured from the creation of the *parlement* onward, and yet, one that was well endorsed by modern historians who constrained their narratives “to the sovereign attributions and political activities that were manifested in that room.”<sup>61</sup> Implicit in these historical narratives of the court, he finds a link between “the unity of place” and “unity of action”;<sup>62</sup> a connection that I also embrace in this chapter to explain how place and knowledge practices are imbricate.

What I understand as a detached and localized representation of the Court’s practices cannot be identified with any individual room, such as the hearing room described by Ratel as the overriding image of the *Parlement*’s activities.<sup>63</sup> Judicial practice at the Court is usually regarded as constrained within a space that is vague and diffuse but nonetheless removed, distant. In my opinion, this space is constantly enacted in the Court bureaucrats’ representations of the Court’s “essential” functions, for which the tribunal should keep itself apart, detached from those aspects that are not a proper matter of law, that is, of the Court. “There are cases that *should not* be here [in the Court],” a Justice’s clerk told me while pointing toward the dossiers piled up

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<sup>59</sup> Leticia Barrera, “Restoring Legality: Performativity, Transparency, and the Crafting of a New Institutionality” (paper presented at the American Anthropological Association Annual Meeting, San Francisco, November 19-23, 2008).

<sup>60</sup> Ratel, “Subjects by Law.”

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> As a matter of fact, judicial procedure in Argentina—with the exception of the changes introduced to federal criminal procedure in the early 1990s, and the public hearings that from time to time are held by the Supreme Court—builds upon a marked tradition of written and faceless procedure. See Chapters Four and Five of this dissertation.

for review on her office's floor.<sup>64</sup> Yet, it is common that clerks see the current caseload as a deviation from the Court's proper activities, and hence from the status it enjoyed in the past when the Court had more control of its docket.<sup>65</sup> But also importantly, scholarly narratives have contributed to create an image of judicial practice as a phenomenon separated from social practices. In this sense, the field is rich in metaphors of space that further a commonplace image of judicial practice in terms of hierarchy, status, and enclosure. Like Court bureaucrats, these metaphors work to remove the practice of the tribunal from the public at large; however, while in the accounts of those bureaucrats the judicial space is something conceptually diffuse and imprecise, scholarly representations tend to locate this space "behind-the scene," to borrow Ratel's terms.<sup>66</sup>

In building upon these two aspects of restoration, on the one hand, the messiness and impracticality that a restoration process brings about, and, on the other hand, the preservation and recovery of the damaged object that a restoration project presupposes, I seek to reflect the tensions regarding the construction of judicial authority in the particular context of the Argentine Court's practices. But yet, this effort of renegotiating the semantic field is not the subject of a focused analysis in this chapter. Rather, I rely on it only *laterally*, through the aesthetics of restoration, to comprehend and restage my subjects' everyday practices, as affected—or not—by the context in which they unfolded in my fieldsite. My main point in this chapter, instead, is that we can gain access and draw useful insights on the Court's knowledge practices by observing the spatial dynamics of the legal institution as this makes visible how place and the relations it enacts exist in a mutually constitutive association. This means to draw my analysis not only on my direct observation of the daily dynamics of

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<sup>64</sup> Interview, June 22, 2006. See Chapter Four.

<sup>65</sup> Interviews, October 21, 2005, March 3, 2006, June 22, 2006, October 30, 2006, December 15, 2006.

<sup>66</sup> Ratel, "Subjects by Law."

the Court, but, more importantly, on particular moments in which the judicial institution is instantiated through my subjects' notions and senses of place. My argument, however, would not be complete without explaining my point of departure.

Accordingly, in the next section, after introducing a brief vignette about law's relationship to place, I address descriptions of legal settings that successfully show how place (i.e. courtrooms) may become an artefact of political and symbolic systems. Nonetheless, despite my sympathy for these approaches, I find them still engaged with the notion of place as static, fixed, an even external phenomenon. In the subsequent section I introduce the bodies of literature that informs this chapter in connection with the larger approach to which this project is indebted. Later, I provide a description of the Court's spatiality that seeks to replicate my own access to the institution. A series of metaphors of space through which judicial actors and socio-legal scholars imagine and re-create the judicial institution also flow in my description. However, as the ethnographic materials presented in this chapter will demonstrate, the commonplace representations of the judicial space that these metaphors further are challenged permanently by the Court's own social dynamics. Building upon the relations of space and knowledge that unfold in legal bureaucracy's practice, I return in the conclusion to the point about the (re)construction of judicial authority suggested by the aesthetics of the Court's building restoration.

### ***The Symbolic Place***

The association of law and place usually spawns enduring debates about the *place* of law; indeed, as Sarat, Douglas and Umphrey assert: "It is difficult to think of law without adding the name of a place—be it a powerful nation-state, or a small municipality."<sup>67</sup> Despite the fact that these debates are beyond the scope of this work,

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<sup>67</sup> See: Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, "Where (or What) Is the Place of Law? An Introduction." in *The Place of Law*, Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, eds. (Ann Arbor: The University of Michigan Press, 2003), 1-20, 1.

it is worth mentioning them very briefly.

Law's relationship to place has usually been analyzed in fairly standard geopolitical terms—territory, sovereignty, jurisdiction, etc.<sup>68</sup> However, new analytical forms emerging from recent socio-legal scholarship offer alternative ways (bureaucratic;<sup>69</sup> disciplinary;<sup>70</sup> ideological; etc.<sup>71</sup>) of conceptualizing the role of law in the construction of place and *vice versa*. Indeed, Sarat, Douglas and Umphrey notice a shift in the literature about the modes of interpreting place *vis-à-vis* law, which, leaving behind geopolitical notions of place, asks instead about its sociological construction. According to these authors, this literature may be grouped in two general ways of thinking about the place of law in social life: the instrumentalist, on the one hand; and constitutive, on the other hand. For the instrumentalist, law is just a tool, an auxiliary for changing aspects of social life or maintaining the *status quo*. Instrumentalism draws on a firm division between the legal and the social, and, therefore, denies that law is already an integral part of what it regulates.<sup>72</sup> Law is interpreted as outside of real life, as an artificial category. In contrast to this, the constitutive perspective takes law's interior place in society as the starting point for its analysis. Law shapes society from inside out, and is imbricate in social relations<sup>73</sup>—law is a part of the structure in which social action is embedded.<sup>74</sup> In thinking about the place of law, the scholars who adopt the constitutive perspective, “tend to see the links between law and society at the level of networks of legal practices on the one

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<sup>68</sup> Ibid.

<sup>69</sup> See, e.g. :Annelise Riles, *The Network Inside Out* (Ann Arbor: The University of Michigan Press, 2001).

<sup>70</sup> See, e.g: Susan S. Silbey and Patricia Ewick, “The Architecture of Authority: The Place of Law in the Space of Science,” in *The Place of Law*, Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, eds. (Ann Arbor: The University of Michigan Press, 2003), 75-107.

<sup>71</sup> See: Riles, *The Network Inside Out*.

<sup>72</sup> Sarat et al, *The Place of Law*, 6.

<sup>73</sup> Ibid., 7.

<sup>74</sup> See: David Trubek, “Where the Action Is: Critical Legal Studies and Empiricism,” *Stanford Law Review* 36 (1984): 575-622.

hand, and clusters of beliefs, on the other.”<sup>75</sup>

Descriptions of the legal settings, mostly courtrooms, have played a central role in socio-legal analysis of courts’ decision-making processes. In recreating courtrooms’ designs and management, scholars seek to account for the nature of the legal proceedings they observe. Rituality, drama,<sup>76</sup> performance, constraint, surveillance, and even informality,<sup>77</sup> are some of the categories used to describe the life of the court. Yet, the aesthetics of courtrooms may themselves at times adopt an overtly political role, as we see, for instance, in Hannah Arendt’s *Eichmann in Jerusalem: A Report on the Banality of Evil*:

[...] the proceedings happen on a stage before an audience, with the usher’s marvelous shout at the beginning of each session producing the effect of the rising curtain. Whoever planned this auditorium in the newly built *Beth Ha’ am*, the House of the People (now surrounded by high fences, guarded from roof to cellar by heavily armed police, and with a row of wooden barracks in the front courtyard in which all comers are expertly frisked), had a theater in mind, complete with orchestra and gallery, with proscenium and stage and

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<sup>75</sup> Sarat et al., *The Place of Law*, 7.

<sup>76</sup> I have in mind Luigi Ferrajoli’s portrayal of a trial. Suggesting an analogy between historians and judges, Ferrajoli argues: “A trial is, so to speak, the only case of ‘historiographic experimentation’—in a trial the sources are forced to interact *de vivo*, not only because they are heard directly, but also because they are forced to confront one another, subjected to cross-examination and prompted to produce, as in a psychodrama, the adjudicated event.” Luigi Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (Bari 1989) 32; quoted in Carlo Ginsburg, *The Judge and the Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice*, (London: Verso, 1999), 18. There is also a vast literature on courts assuming a “staged-for-an audience” aspect. See Chapter Five of this dissertation.

<sup>77</sup> Noticeably, informality appears as antagonistic to the alleged solemnity and detachment associated to justice administration in the Euro-American tradition.

with side doors for the actors' entrance.<sup>78</sup>

Likewise, in analyzing the Israeli military court system, Lisa Hajjar interprets this system's courtrooms as instantiations of the Israeli-Palestinian conflict itself: "The bench is on an elevated dais, enabling judges to survey the room over which they preside. It requires little stretch of imagination to read the position of judges as analogous to that of the Israeli state they represent, or the courtroom as a synecdoche of Israeli surveillance and control over the occupied territories. Defendants see the courtroom through the bars of a fenced enclosure that surrounds the dock. This, too, is analogous to the constraints and punitive dimensions of life under occupation."<sup>79</sup>

Though more subtly, Michael Peletz's account of the informality pervading the atmosphere of Malaysian religious courts may be read in equally political terms: "most of the hearings in the courthouse are held in the *kadi*'s chambers, not in the actual courtroom. The *kadi* prefers to hold hearings in his chambers because those who appear before him are more comfortable and relaxed in that setting...The various decorations adorning the desks and work spaces of the staff help render the courts more familiar to litigants and others who visit the building...the presence of the *kadi*'s children contributes to the informal atmosphere within the courthouse and helps convey the impression that the *kadi* is a father and, by implication, a husband. Because he is a 'family man', the *kadi* certainly knows something of the challenges of maintaining relationships, of what is involved in supporting a wife and children, and of what his familial duties and responsibilities are."<sup>80</sup>

In accounting for courts' spatial aspects, scholars usually build upon

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<sup>78</sup> Hannah Arendt, *Eichmann in Jerusalem, A Report of the Banality of Evil* (New York: Penguin Books, 2006) 4. As the narrative proceeds, we see that this portrayal of the courtroom is vital for her critique of the prosecutor and the government's conduct during the trial.

<sup>79</sup> Lissa Hajjar, *Courting Conflict, The Israeli Military Court System in the West Bank and Gaza* (London: University of California Press, 2005), 79.

<sup>80</sup> Michael G. Peletz, *Religious Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2002).

generalizations about the court's symbolic construction.<sup>81</sup> This idea is epitomized in Antoine Garapon's work *Bien Juger, Essai sur le Rituel Judiciaire*, in which the author studies an architectural style specific to the construction of the judicial space.<sup>82</sup> The canon of "architecture judiciaire" (judicial architecture), says the author, is the result of a long and complex historical construction.<sup>83</sup> Garapon's genealogy of the "temple de justice" (justice temple) accounts for the symbolic external "registres" (or styles) (cosmological,<sup>84</sup> mythological, religious,<sup>85</sup> and historical, among others) that initially commanded the construction of the judicial space. He notes that when the figure of the "palais du justice" (palace of justice) became associated with that of a "Temple" in early eighteenth century, the emancipation of adjudication from religion was complete, and justice gained symbolic autonomy, that is, justice's symbols became secularized.<sup>86</sup> Garapon also provides a detailed and enlightening description of how canonical judicial architecture gets therefore organized around the notions of distance, neutrality of forms, abstraction, separation, enclosure, symmetry, order, etc., that symbolize modern judicial adjudication (i.e. impartially, objectivity, detachment, rationality). Remarkably, the symbols, when taken in conjunction, play a significant role in elevating justice to the realm of the sacred.<sup>87</sup>

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<sup>81</sup> See, e.g., Susan J. Terrio, "You'll Get Your Day in Court: Judging Delinquent Youth at the Paris Palace of Justice," *The Political and Legal Review* 26: 2 (2003): 136-164, 153-156.

<sup>82</sup> Antoine Garapon, *Bien Juger, Essai sur le Rituel Judiciaire* (Paris: Editions Odile Jacob, 1997).

<sup>83</sup> Garapon follows Robert Jacob and Nadine Marchal's chronology of the process of construction of judicial buildings in France. They account for six periods: the era of adjudication without location (by the end of twelfth century, approximately); the medieval judicial architecture, by the end fifteenth century; the big wave of construction of judicial edifices from Louis XXII to Henri IV; the period of royal power confirmation through majestic monuments; the "classic" period (from 1760 to 1960) in which the judicial style is consolidated and expands across the country; and the current period, whose contours are yet relatively uncertain. Ibid, 24.

<sup>84</sup> The connection with the forces of nature seems important for justice. Following Carbonnier, he argues that the tree is a symbol omnipresent in the judicial decoration. Ibid, 25.

<sup>85</sup> Though the religious style does not conceptualize adjudication as a directly divine function, this is nonetheless implicit in displays of religious symbols (i.e. crucifixes or reliquaries) that serve to "remind" justices' of the ethical content of their work. Ibid, 28.

<sup>86</sup> Ibid, 29.

<sup>87</sup> Ibid., 38-9.



Place is essential for Garapon's description of what he calls the "évènement de juger" (the event of judging, adjudicating);<sup>88</sup> and he succeeds in pointing out the symbolic link between space and judicial practice.<sup>89</sup> Nonetheless, I think that his placing so much emphasis on the symbolic judicial apparatus actually overlooks the effects of mundane bureaucratic practices on the construction of the judicial institution. The "cadre symbolique" through which justice works builds upon the separation between legal and social practices—law and society are, therefore, mediated through justice's rituals and symbols. In this scheme, judicial practice assumes an artificial and even dramatic character; and gets confined to the legal procedure developed within the boundaries of a fixed locality, the judicial palace.

### ***The Nature of Place: theoretical considerations***

As I elaborate below, place (or the judicial space, paraphrasing Garapon) unfolds in my field site as a composite of spatial aspects and individual and institutional practices that enact the Court—for instance, circulation of files; public hearings; and even, the Court's use of *certiorari*.

In his ethnographic research of Bomana Prison in Port Moresby, Papua New Guinea's capital, Adam Reed offers an insightful account of the links between place and relations. Drawing on other anthropologists working in Melanesia, he argues:

Places take the form and significance through the history  
of life activity that marks them—the gardens people  
make, the houses they build, the paths they use, the

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<sup>88</sup> "Justice's first attitude is neither intellectual nor moral, but architectural and symbolic: to demarcate a perceptible space that keeps moral indignation and public anger at distance, to save time for itself, to establish the rules of the game, to agree upon an objective, and to set up the actors." Ibid, 19.

<sup>89</sup> Nowadays, the palaces of justice are abstracts of the judicial procedure, which is itself defined as a socially neutral form: ready to receive any claim or to hear any argument insofar as it follows the right [procedural] forms. Impartiality [of forms] means to search inside [their] impersonality.) Ibid. 30. Overall, as Bruno Latour notes, Garapon borrows from ethnologists their "petit bagage de rite-mythe-symbole pour redéfinir avec talent la pratique juridique." Bruno Latour, *La fabrique du droit. Une ethnographie du Conseil d'État* (Paris: La Découverte /Poche, 2004), 292, footnote 63.

everyday acts of feeding and sharing (Weiner 1991; Kahn 1996; Leach 2003). Particular landmarks—a river, a group of stones or a mountain—reflect peoples’ memories of those events and remind them of obligations. **Sets of relations animate those places, just as places animate those relations.**<sup>90</sup>(emphasis added).

Moreover, as Annelise Riles recalls, anthropologists, literary theorists, cultural geographers and even legal scholars all addressed—in various ways—both the constructed and the constructive nature of space and place in the early 1990s.<sup>91</sup> That scholarship, she notes, focused on the fundamental role that conceptions of place— aesthetic, geographic and political—played in the formation of personal, group, and national identities: for instance, studies showed that ideological constructions of space and place informed regimes of racial exclusion; that displacement correlated to the loss of personal or group identity; and even that space became a means of resistance and empowerment.<sup>92</sup>

Similarly, while drawing on the tensions between place and space, Edward Casey approaches the culturally constitutive character of place from a phenomenological point of view.<sup>93</sup> He explains the special ways in which place is

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<sup>90</sup> Adam Reed, *Papua New Guinea’s Last Place: Experiences of Constraint in a Postcolonial Prison* (New York-Oxford: Berghahn Books, 2004), 3.

<sup>91</sup> Annelise Riles, “The Empty Place: Legal Formalities and the Cultural State,” in *The Place of Law*, Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey, eds. (Ann Arbor: The University of Michigan Press, 2003), 43-73.

<sup>92</sup> *Ibid.*, 43.

Among the most relevant works of that epoch, are Arjun Appadurai, “Place and Voice in Anthropological Theory,” *Cultural Anthropology* 3 (1988) 16-20; Akhil Gupta and James Ferguson, “Beyond Culture: Space, Identity, and the Politics of Difference,” *Cultural Anthropology* 7 (1992) 6-23; Margaret Rodman “Empowering Place: Multilocality and Multivocality,” *American Anthropologist* 94 (1992):640-656.

<sup>93</sup> Edward S. Casey, “How to Get from Space to Place in a Fairly Short Stretch of Time. Phenomenological Prolegomena” in *Senses of Place*, Steven Feld & Keith H. Basso ed. (Santa Fe, NM: School of American Research Advanced Series, School of American Research 1996), 13-52.

manifested, hence stressing its gathering capacity. Minimally, Casey argues, place holds things (both animate and inanimate entities); but it also keeps experiences, histories, even languages and thoughts: “Being in a place is being in a configurative complex of things.”<sup>94</sup> Casey makes it clear that he does not take place to be something simply physical. He argues instead that place is more an event than a thing to be assimilated to known categories (i.e. space and time, substance or causality). As events, places continually demand from us new forms of understandings:

Rather than being one definite sort of thing—for example, physical, spiritual, cultural, social—a given place takes on the qualities of its occupants, reflecting these qualities in its own constitution and description and expressing them in its occurrence as an event: places not only *are*, they *happen*...Sorts of places depend on the kinds of things, as well as the actual things, that make them up.<sup>95</sup> (*italics in the original*).<sup>0</sup>

Perception is central to Casey’s phenomenological account of place: there is no knowing or sensing a place except by being in that place; and to be in a place is to be in a position to perceive it.<sup>96</sup> Casey argues that place is the most fundamental form of embodied experience—the site of a powerful fusion of self, space and time.<sup>97</sup> Place is, therefore, a concrete experience.

In one sense, all of these approaches are remarkably consistent: they share a similar starting point—a different engagement with place—which, in turn, opens up different analytical possibilities. This approach has particular resonances with Science

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<sup>94</sup> Ibid., 25.

<sup>95</sup> Ibid., 27.

<sup>96</sup> Ibid., 17-8.

<sup>97</sup> Steven Feld and Keith H. Basso, “Introduction”, in *Senses of Place*, Steven Feld and Keith H. Basso ed. (Santa Fe, NM: School of American Research Press, 1993), 4-11, 9.

Studies scholar Bruno Latour's work, whose influential approach to scientific knowledge production influences this project. Turning to the study of law, by inquiring into the decision-making process in the French *Conseil d'État*, Latour accounts for the legal process as an assemblage of people, texts, everyday objects and even architecture.<sup>98</sup> Following the clerical movement of files, he makes visible the network of people, objects, texts, concepts, and even infrastructure that make up the legal phenomenon.

### *In the Place*

Located across "Plaza Lavalle" (Lavalle Square) in downtown Buenos Aires<sup>99</sup>—the "Palacio de Tribunales" (Tribunal Palace, hereafter the *palacio*), home of the Supreme Court, is an eight-story building designed by the French architect Norbert Maillart following the European classicism canon. The building itself is considered a typically eclectic work due to its stone-like façade, its Doric style pillars, the monumental appearance, the sculptures, and the sober decoration—features altogether taken as symbols of the function "that the building was called to perform."<sup>100</sup> The project began in 1904 and, even though the building was not complete until late 1940s, it opened in 1910.

Visitors can access the building through the three public entrances located on the second floor—the main entrance on the front, facing Lavalle square; and two on

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<sup>98</sup> Bruno Latour, *La fabrique du droit*.

<sup>99</sup> More precisely, in a neighborhood traditionally known as "Tribunales," in reference to the several federal courts concentrated in the same area. The neighborhood includes approximately eight squares, and it is more a business district than a residential area due to the high concentration of law firms and notary public offices. Additionally, most of law books publishers—"Ad Hoc," "La Ley," "El Derecho," "Librería del Jurista," "Doctrina Jurídica"; "Hamurabi"; "Lexis-Nexis Argentina"; "Jurisprudencia Argentina; etc.—are gathered in this area. Another particular feature of the neighborhood is the number of coffee stores named after a judicial element, such as "El Foro"; "Ulpiano"; "Fojas Cero"; "Cátedra Jurídicaa." See: Lucia Eilbaum, "*Quando o peixe morre pela boca: Os 'casos de polícia' na Justiça Federal Argentina na cidade de Buenos Aires*" (Master thesis, Universidade Federal Fluminense, Niteroi, Rio de Janeiro, 2005).

<sup>100</sup> Comisión Nacional de Museos y de Monumentos y Lugares Históricos, <http://www.monumentosysitios.gov.ar> (accessed November 1, 2007). See, also: Garapon, *Bien Juger*.

each side of the building. The *palacio* not only houses the Supreme Court's offices; it is also the home of federal first instance courts, court of appeals, and a number of other offices involved in the administration of justice. Space organization tends to be vertical—as it is mostly observed in the distribution of the criminal courts: while the judges in charge of pretrial investigation (instructing judges) are on the third floor, the trial courts are on the seventh.

On the way through the front entrance there is the atrium; on its facing wall, a ten foot tall statue (an allegory of Justice) dominates the scene. Two lateral hallways connect the atrium to the main court (“patio principal”), the building's most vital center. The *patio* hosts a branch of the City of Buenos Aires Bank (“Banco Ciudad,” where attorneys usually line up to pay the docket fees), a post office, and a convenience store. A bit further down, off one of the hallways, there is also the press room. At the rear there is the Federal Court of Appeals' hearing room (“Sala de Audiencias de la Cámara Federal”). This room has a special meaning in the Argentine judicial history, as in that place the military *juntas* that ruled the country from 1976 to 1983 were tried and convicted in December 1985 by the Federal Court of Appeals. Thus, any mention of the so-called “juicio a las juntas” (trial to the *juntas*) seems inescapably associated to that courtroom. In many senses, this particular image became a symbol of democratic restoration and subjection of the military dictatorship to the rule of law, even through the uneasy transition. Carlos Nino describes this trial's beginning in this way:

The first public hearing in the “big trial” took place on April 22, 1985. The atmosphere was highly charged and emotional. Fifty thousand people demonstrated, in Buenos Aires as well as the cities in the interior, in support of the trial. Many people were moved when they

saw the once all-powerful dictators stand as the six civilian judges entered the room. Hebe de Bonafini,<sup>101</sup> Perez Esquivel<sup>102</sup> and Eduardo Rabossi<sup>103</sup> attended the first hearing. The atmosphere was rather heated, when Jose Maria Orgeira, Viola's<sup>104</sup> counsel, addressed the court in a disrespectful manner, the presiding judge, Arslanian, ordered his disciplinary arrest.<sup>105</sup>(quotes in the original).

Nowadays, this courtroom is used by the Supreme Court and serves as an *ad hoc* hearing room for other tribunals (i.e. the Supreme Court itself; or the Special Jury<sup>106</sup> that adjudicates in cases—impeachments—against federal judges).

The second floor is also the home of a number of lower court offices. As I mentioned above, first instance tribunals and court of appeals are spread across the building. Yet, the Supreme Court has moved recently its admission office (“Oficina de Mesa de Entrada”), from the fourth to the second floor, certainly a more accessible place than its previous location.<sup>107</sup> Among the offices with significant roles in judicial adjudication other than courts that operate in the *palacio*, I want to note the Judicial

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<sup>101</sup> The President of the Association of Madres de Plaza de Mayo.

<sup>102</sup> An Argentine Human Rights activist and 1980 Peace Nobel Prize Laureate.

<sup>103</sup> A philosopher and lawyer, and Undersecretary of Human Rights during President Alfonsín's administration (1983-1989). He was one of the members of the CONADEP (National Commission on Disappeared Persons), the executive commission created right after Alfonsín took office in December 1983. The commission was charged with the investigation of the fate and whereabouts of those who had disappeared during the latest dictatorship.

<sup>104</sup> One of the defendants, an Army general and *junta* member who acted as the Nation's president from 1979 to 1981.

<sup>105</sup> Carlos S. Nino, *Radical Evil on Trial* (New Haven and London: Yale University Press 1996), 82.

<sup>106</sup> The Jury was created by the latest Constitutional Amendment in 1994 and regulated by Law of Congress. See: Argentina's Constitution, Section. 115; Law No. 24937, December 10, 1997, B.O. 28802, 2; and Law No. 26080, February 22, 2006, B.O. 30854, 1. The latter statute was passed amidst an intense political debate as it changed the composition of the Jury members. The Jury has jurisdiction over all federal judges except Supreme Court Justices who can be removed only by Congress' impeachment. See Argentina's Constitution, sections 53 and 56.

<sup>107</sup> Fieldnotes, February 4, 2008.

Detention Center #28, located on the building's basement.<sup>108</sup> Generally known as the "Alcaida de Tribunales," the detention center is actually a branch of the Federal Penitentiary Service ("Servicio Penitenciario Federal")<sup>109</sup> in charge of transporting criminal defendants held in pretrial detention from the prison facility to the court and *vice versa*. Institutional information on the center notes that it is only a transit place, thus, no prisoner can be held in custody overnight, except by judicial decree.<sup>110</sup> Though visits are not allowed there, family gatherings (mostly women and children) at the entrance of the detention center are part of prisoners' daily arrival and departure routines.



**Figure 3. Entrance to the Judicial Detention Center on Lavalle Street**

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<sup>108</sup> The Judicial Forensic administrative offices are also in the *palacio*.

<sup>109</sup> See: Noticias Penitenciarias, 25 años de la Alcaidía de Tribunales, <http://www.spf.gov.ar/noticias/boletin47h2.htm> (accessed November 6, 2007).

<sup>110</sup> Ibid.

The fourth floor exclusively houses the Supreme Court's offices. The occupants include the seven Court Justices, the Justices' clerks, the Court's General Administration office, and a few general Court clerks (*Secretarios de Corte*).<sup>111</sup> As I will explain further in this dissertation when I discuss the division of labor within the Court, law clerks at the Court may work for a Justice (in that case, they work in a Justice's "vocalía") or in one of the Court's eight specialized judicial secretaries ("secretarías judiciales," or just "secretarias"). The *secretarías* are chaired by Supreme Court clerks ("Secretarios de la Corte Suprema"; or "Secretarios de Corte"; or just "Secretarios"). Law clerks and Court clerks are equally "funcionarios judiciales" (judicial bureaucrats, civil servants), though they rank differently in the judicial hierarchy (the latter hold a higher-ranking).

Also on the fourth floor, across the Honor Court ("Patio de Honor"), there is a compound of rooms devoted to institutional events. Among them, the Court's hearing room or courtroom ("Sala de Audiencias"); the Justices' conference room or "Sala de Acuerdos," the site of Justices' formal weekly business meetings; the ambassadors' room, devoted to official gatherings or special occasions;<sup>112</sup> and the so-called "tea room"—at present the Court clerks' waiting room.<sup>113</sup>

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<sup>111</sup> For a description of the division of labor within the Court, see Chapter Three of this dissertation.

<sup>112</sup> This room is also informally called "el besamanos" (the hand-kissing room), as the Justices gather in this room to greet the Court's staff during Christmas and New Year celebrations. Interview, December 16, 2005.

<sup>113</sup> After their Tuesday meeting (at which the Court clerks attend), Justices may decide to deliberate privately on cases. Therefore, the Court clerk whose office is responsible for the case being discussed by the Justices, moves to the tea room to wait to be called if further information on the case is needed. Interviews, October 25, 2005, November 2, 2006, December 14, 2005; December 16, 2005.





**Figure 4. *Salón de Acuerdos*  
(Corte Suprema de Justicia de la Nación)**

This is the *salón de acuerdos*, the Supreme Court's conference room, where the Justices meet every Tuesday at 9:00 AM around this ten-sided table to approve and sign the final versions of their decisions. Notice the crucifix on the facing wall, and the Argentine flag in a glass box at the corner.<sup>114</sup>

In addition to the fourth floor and the second floor, the Court's offices have expanded gradually to other floors, a fact that several of my informants take as evidence of the rapid growth of the judicial (Court's) body—both in number of its staff members and its docket—since the early 1990s.<sup>115</sup> Accordingly, most of the third floor has been devoted to the Court's office space, including the offices of Court

<sup>114</sup> For a more detailed description of the furniture of this conference room, and the proceedings held therein, see: Héctor E. Sabelli, "Cómo trabaja la Corte," *Jurisprudencia Argentina* Suplemento I (2007): 3-11.

<sup>115</sup> According to one informant, there are Court offices even on the seventh floor. Interview, August 18, 2006. Another informant told me that the Court's expansion to the seventh floor took place during the latest economic crisis (2001-2002), when the *Secretaría* of Tax, Customs and Banking Law (*Secretaría* No. 7) "collapsed" due to the amount of lawsuits filed by bank depositors. There was not enough room for those files in the *Secretaría*'s third floor offices; thus it was necessary to find a new place to store the dossiers, she explained to me. Personal communication, February 1, 2008.

clerks and their law clerks. When I asked about the reasons behind such a spatial distribution, that is Court clerks' offices being located on the third rather than on fourth floor, an informant responded that many of the third floor's occupants had been relocated as a result of the Court's enlargement process—it was necessary to make room for the new Court's staff, that is the post-enlargement Justices and their clerks, he said.<sup>116</sup> The Justices, he explained to me, traditionally exercise the privilege of locating their clerks' offices nearby.<sup>117</sup> He, however, also believes that in some instances relocations have been used as a means of [masked] punishment to high-ranking Court's functionaries.<sup>118</sup>

The seventh floor is mainly occupied by the Court's Central Library. The library's reading room is open to the public from 7:30 AM to 7:00 PM. Admittance is allowed upon showing a personal ID, or a Buenos Aires Bar Association's membership card (so-called “Tomo y Folio,” in reference to the way that membership numbers are recorded in the Bar Association's files).<sup>119</sup> First-time visitors' names and

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<sup>116</sup> In 1990, a Court-packing plan promoted by then-President Carlos Menem (1989-1999) enlarged the Court from five to nine members, and also increased the number of law clerks from approximately thirty in the 1980s to over 150 by the mid-1990s. See: Horacio Verbitsky, *Hacer la Corte* (Buenos Aires: Planeta, 1993); Gretchen Helmke, *Courts under Constraints, Judges, Generals and Presidents in Argentina* (Cambridge: Cambridge University Press, 2005). My informants' (clerks and judges) estimations about the current number of clerks are vague; though they estimate that number to be around 150. In 2006, Congress passed a law cutting down the number of Supreme Court's Justices to five. However, since the number of Justices was seven at the time the law was enacted, it was therefore statutorily established that the Tribunal would be composed provisionally by seven members— and that four (out of seven justices) would make majority. See: Law No. 26183, November 29, 2006, B.O.31055, 1. See, also Chapter Three of this dissertation.

<sup>117</sup> Interview, December 16, 2005.

<sup>118</sup> Interview, December 14, 2005.

<sup>119</sup> In my very first visit to the library's reading room I was asked at the admittance desk if I was a lawyer, to which I responded affirmatively. Then, they requested me to show my Bar Association ID as proof of my professional status. I told the library employee that I did not have one. She looked at me and replied that I had said that I was a lawyer. Yes, I said, but “I am not a member either of the Buenos Aires Bar Association or of any other bar association”. She then asked me for my ID (“Documento de Identidad”) and typed the numbers on her computer keyboard. Fieldnotes, September 9, 2005. Since then, every time I visit the reading room, I just have to repeat, after greeting the employee on duty at the admittance desk, the words “número de documento” (ID number) to warn her or him that I will not access the room by “tomo y folio.” The employee then asks me the number and types it on the keyboard and I wait for a few seconds until my name pops up on the computer monitor. The employee repeats my name and I confirm it. Only then am I cleared to access the reading room.

ID numbers are saved on a computer system for subsequent visits. A big terrace also extends on the seventh floor, around which are situated the offices of the judicial employees' union, the Federal Police Fire Division, facility management, and public restrooms, among others.

On the eight floor the University of Buenos Aires Law School operates one of its legal clinics, so-called “el práctico” (the practice) in reference to the (academic) year long legal practical course that law students must take to graduate. These classes are held from February to December from Monday to Friday, 8:00 AM to 8:00 PM. The clinic offers pro bono legal counseling to low-income people on issues related to family law, immigration law, tort law (battery), social security law, labor law, criminal law, etc.<sup>120</sup> The clinic also participates in client interviewing during business days (except on Wednesdays), from 8:00 AM to 5:00 PM.

As the legal clinic classroom and office are accessible only through the staircase located on the corridor next to the library's reading room, I usually shared the elevator (either the elevator #1 or #2) with students and clients in my way to the Court's library. The elevator #2 takes one directly to the library (and to the clinic); though sometimes this is not the fastest way to get there. During the building's operational hours (from 7:30 AM to 1:30 PM), the line to get a spot on the elevator may take about ten minutes—not to mention during the “rush hours” (11:30 AM to 12:30 PM approximately), when the lines are even longer. There are ten public elevators in the building, which from 7:00 AM to 7:00PM are (mechanically) operated by staff of the *palacio*. The elevators are actually sites of brief intersections: people with different backgrounds come together and break apart. But they also may be

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<sup>120</sup> See: Universidad de Buenos Aires, Facultad de Derecho, Departamento de Práctica Profesional-Centro de Formación Profesional;  
[http://www.derecho.uba.ar/institucional/departamentos/practica\\_profesional/centro\\_form\\_prof.php](http://www.derecho.uba.ar/institucional/departamentos/practica_profesional/centro_form_prof.php)  
(accessed March 3, 2008).

regarded as artefacts of the hierarchical [judicial] organization. Signs inside the public elevators citing a 1974 resolution order preferential treatment (priority) to the magistrates who identify themselves as such to elevator operators.<sup>121</sup> In other words, they grant judges a spot on the public elevators. However, I did not see it in practice during my fieldwork. That was not because judges do not have priority; but because judges usually take elevators other than those assigned to the public. Indeed, besides these elevators, there are two exclusive ones: one for lower-instance judges, Court clerks, law clerks and other judicial bureaucrats; and the other for Supreme Court Justices; though the latter also may be used by distinguished visitors, like high-ranking government officials, foreign chiefs of state, diplomats, etc.<sup>122</sup> I recall an anecdote from the field that shows how hierarchical space distribution is enacted through the use of elevators: it was January 2007, at the very end of the judicial holiday (“*feria judicial*”), and I had just finished my interview with a law clerk. She gently offered to accompany me to the elevator. We left her office and she naturally turned in direction to the elevator that she, a Court bureaucrat, usually took. She called the elevator while affirming that that would be the fastest way to get out of the building. I asked her if I was “allowed” to use that elevator, and she responded that nobody would care; that it was almost evening, and also the building was empty due to the summer break. Yet, she replied to my query with another anecdote, one of her own: she was walking along with a Court Justice through one of the hallways on the fourth floor. She was relating an informal oral report on a case she was studying. She then stopped suddenly when

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<sup>121</sup> Supreme Court Resolution No. 464, 1974. Following customary courtesy rules, another sign posted on the elevators’ facing walls grant priority access to the elevator to people with reduced mobility, pregnant women, and women with babies.

<sup>122</sup> I personally witnessed the reception ceremony held on the occasion of the visit of Chile’s President Michelle Bachellet to the Supreme Court on March 22, 2006. On that opportunity, two Justices waited for Bachellet’s arrival at the *palacio*’s doorways, escorted her on a red carpet through the atrium to the Justices’ elevator that would take them to the fourth floor to join the other Supreme Court Justices. A quite similar ceremony was held on the occasion of Brazilian President, Luiz Inacio (Lula) Da Silva’s visit to the Supreme Court on February 22, 2008.

she realized that the Justice was heading to the Justices' elevator. She asked the Justice the same kind of question I asked to her: whether she was allowed to get on that elevator reserved for the Justices exclusively. He replied she could because she was with him.<sup>123</sup>

### ***Mobilization***

The easiest way to get to the fourth floor (the Court's floor) is taking either of the two main staircases located on either side of the main *patio* on the second floor.<sup>124</sup> Signs painted on the walls indicate the floor numbers, though the fourth floor is exceedingly noticeable by the fences that block the direct passage from the staircases and the hallways to the Court's offices. As the fences are not fixed, one may access the floor by simply getting around them (usually there is a small break between the fences and the wall). Once on this floor, the Justices' chambers are easily discernible due to the fact that in front of most of them<sup>125</sup> there is a police officer guarding the door.

The fences in the Court date from the most recent economic crisis (2001/2002),<sup>126</sup> when the Court became a target of middle-class protestors who demonstrated, first against the restrictions imposed by the De la Rúa Administration on cash withdrawals from bank accounts (the so-called "corralito," or the blockade

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<sup>123</sup> Interview, February 20, 2007. Nonetheless, on different occasions I saw people other than clerks using the clerks' elevators. A few of them confided to me that they did so as mode of challenging the judicial hierarchy. Fieldnotes, September 5, 2006.

<sup>124</sup> There are eight other (secondary) staircases on the sides and the rear of the *palacio*.

<sup>125</sup> With the exception of one Justice's office, the rest are safeguarded by police staff.

<sup>126</sup> Probably the most salient aspect of the 2001/2002 Argentine crisis was the economic breakdown (both the financial crisis and the debt default), reflected by the image of hundreds of depositors banging pots at the bank doorsteps. This picture, however, leaves aside a series of events that triggered the crisis and eventually led to then-President De la Rúa's resignation. Among these events, Smulovitz includes the resignation of the vice president Carlos Alvarez in October 2000, the midterm defeat of the ruling party (the Alliance) on October 14, 2001, key cabinet members' resignations, the IMF refusal to continue paying the bailout loan, and "the still unclear role of some Buenos Aires Province Peronist Party leaders in the lootings that marked the end of De la Rúa's government." See Catalina Smulovitz, "Protest by other means. Legal mobilization in the Argentinian Crisis" (2003). Unpublished manuscript on file with the author.

drawn around bank accounts restricting access to savings),<sup>127</sup> and later against the “pesification”—the forced conversion of the previously frozen savings accounts in U.S. dollars into Argentine pesos at unfavorable rates.<sup>128</sup> Additionally, as early as December 2001, thousands of injunctions (“amparos”) against the *corralito* were being filed all across the country, both in Federal and Provincial courts.<sup>129</sup> Gretchen Helmke provides a sensitive description of that moment: “Week after week, hundreds of protesters gathered outside tribunales and the private homes of the justices<sup>130</sup> to demand their resignations. In expressions of rage and disgust, protesters carried signs

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<sup>127</sup> Decree No. 1570, December 1, 2001, B.O. 29787, 1. President De la Rúa resigned on December 20, 2001 in the midst of riots and massive mobilizations held in reaction to his declaration of a state of siege the day before. His resignation followed that of his Minister of Economy, Domingo F. Cavallo, the so-called “father of convertibility.” De la Rúa’s resignation set the country off on a rapid succession of five presidents until Congress appointed Senator Eduardo Duhalde (Peronist Party) as provisional president on January 1, 2002 until new elections were held. For a description of the post-De la Rúa scenario, see: Victoria Goddard, “This is History. Nation and Experience in Times of Crisis-Argentina 2001,” *History and Anthropology* 17: 3 (2006), 267-286; Smulovitz, “Protest by Other Means.”

<sup>128</sup> In the public’s imaginary the Supreme Court appeared as co-responsible for the economic collapse. In the moment previous to the crisis, the composition of the Supreme Court seemed inevitably associated with President Menem’s Administration and his ten-year long “convertibility” monetary policy (tying the unit of Argentine currency—the Peso—to the U.S. Dollar’s fluctuations) that triggered Argentina’s economic stagnation in the second half of the 1990s. Menem had appointed six of the nine Justices who were sitting on the bench at the time the crisis exploded.

<sup>129</sup> Based on statistical information provided by the National Judiciary Bulletin for the period 2001-2003, Smulovitz notes that injunctions filed against the *corralito* at the federal judiciary total 396,741. See: Catalina Smulovitz, “Petitioning and Creating Rights. Judicialization in Argentina” in *Judicialization of Politics in Latin America*, Rachel Seider, Line Schjolden, and Alan Angell, ed. (New York: Palgrave MacMillan, 2005). Interestingly, when recalling the overwhelming litigation wave triggered by the *corralito* a few informants at the Court mentioned to me that they understood the reasons behind people’s massive turn to courts. In their view, people saw the courts as their last recourse, their last hope; that only the judiciary could guarantee them the rule of law in those critical moments. Interviews, August 18, 2006; October 30, 2006.

<sup>130</sup> In marching to the Justices private homes, protesters replicated an extended mode of demonstration in Argentina so-called “escrache” (to uncover, in Argentine slang), developed during the 1990s and into the 21st century by children of people ‘disappeared’ during the dictatorship (1976–83). *Escraches* build upon public shaming. As performed originally by Human Rights activists, *escraches* “are campaigns of public condemnation through demonstrations that aim to expose the identities of hundreds of torturers and assassins benefiting from amnesty laws. Marchers invade the neighborhoods where torturers live, and walk around the streets carrying banners and singing slogans [...] They inform the community about the atrocities committed by these people, giving away flyers with facts about the one being ‘*escrachado*’ – his photograph, name, address, what he was doing during the dictatorship, cases of human rights violations in which he is implicated, his current occupation and place of work. The demonstrations end in front of the torturers’ homes with a brief ‘ceremony’, some speeches, street theater performances, and music.” Susana Kaiser, “*Escraches*: demonstrations, communication and political memory in post-dictatorial Argentina,” *Media, Culture & Society* 24:4 (2002): 499-516

with phrases including “Argentines: We have already thrown out Cavallo [De la Rúa’s economic adviser]...Now, it is time for the Supreme Court”; “Supreme Ones are the Corrupt Ones”; “Supreme Court: Don’t you have any shame? The people do not want you”; and “Argentina reclaims justice: Get out Supreme Court.” In one particularly symbolic gesture, protesters drove a hearse with a coffin in front of the Court with a sign that read, “The death of Justice.” In another public display, nine actors dressed up in prisoners’ garb with the names of each judge slung around their necks and posed on the steps of *tribunales*. For the first time since the human rights trials, the justices began receiving death threats.”<sup>131</sup> (*italics added*).

Since the time of the crisis the fences have been kept at the premise and moved throughout the building, according to the multiple demonstrations that usually take place both inside and outside the *palacio*.<sup>132</sup> Nonetheless, far from disrupting the Tribunal’s everyday practices, the fences have been gradually integrated to the Court’s daily landscape, as if they were part of its infrastructure. Likewise, the kinds of protests and manifestations that the fences were supposed to deter have been internalized to the *palacio*’s routines. It would be a mistake to see them as exceptional to or even disruptive of judicial practices. For instance, until the Court’s handing down a decision on the *corralito*,<sup>133</sup> in December 2006, bank depositors used to rally every Tuesday morning at the *palacio*’s doorsteps, and then march to the fourth floor demanding the Court’s favorable ruling in the case. This anecdote illustrates this point: it was Tuesday morning and the Supreme Court Justices were holding a public hearing on a pollution case in the Court’s hearing room on the fourth floor. Suddenly,

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<sup>131</sup> Helmke, *Courts under Constraints*, 146.

<sup>132</sup> Another line of fences was placed along the building’s front, but at present it was completely removed after the restoration of the frontal façade concluded in January 2008.

<sup>133</sup> See: “Massa, Juan Agustín c/Poder Ejecutivo Nacional-Dto. 1570/01 y otro s/ amparo Ley 16986”, C.S.J.N., 329 Fallos 5913 (2006). In this ruling, the Supreme Court held that to guarantee both the individual property rights and *the country’s juridical stability*, the only plausible solution is that banks return the savings in U.S. Dollars in local currency at market exchange rate).

a firecracker exploded nearby. The then-Chief Justice turned to the right, and whispered to the Court's Vice-President: "son los ahorristas" ("they are the bank depositors"), and the comment was loud enough to be caught by the microphone and heard by the audience.<sup>134</sup> The hearing, however, proceeded as if the protest was not taking place only few steps from the hearing room.



**Figure 5. The Supreme Court's Floor (Fourth Floor)  
(September 5, 2006 after the first public hearing held on the *Riachuelo* case)<sup>135</sup>**

In addition to the vast repertoire of social protests<sup>136</sup> that hit the judicial scenario in the last several years, other social mobilizations have taken place both inside and outside the *palacio*. Figure 6 shows a rally organized by the Buenos Aires Bar Association to protest Congress' passing a bill modifying the composition of the Special Jury in February 2006. The banner on the left reads "We are the only option";

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<sup>134</sup> Fieldnotes, September 5, 2006.

<sup>135</sup> See Chapter Five of this dissertation.

<sup>136</sup> See Sidney Tarrow, *Power in Movement, Social Movements and Contentious Politics*, second edition (Cambridge: Cambridge University Press, 1998).



the other banner, on the right, reads “Defend yourself, participate, get involved.” The building has become a sort of “natural” protest forum for the National Judiciary Employees’ Union’s (“Unión de Empleados de la Justicia Nacional- UEJN”); professional associations, like the Buenos Aires Bar Association; Non Profit Organizations (NGOs),<sup>137</sup> and Human Rights activists.



**Figure 6. Rallying at the doorsteps of the *Palacio de Tribunales***

The building anticipates the events that will eventually occur. In other words, if you happen to be inside the building immediately before a mobilization, you will most likely realize what is about to happen by observing either the reinforced police guard or the fences’ deployment around a particular site, for instance, the Court’s floor, the hearing room on the second floor, or one of the entrances to the *palacio*. One afternoon, I was to leave the building through one of the side gates that are usually

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<sup>137</sup> Since 1994, members of Memoria Activa” (Active Memory), a non profit organization created after the bombing of the Israeli Mutual Association (AMIA) in July 1994, gather every Monday morning at Plaza Lavalle at 9:53 AM (the exact time of the bombing) to honor the 85 victims and demand for further legal proceedings on the case. See: <http://www.memoriaactiva.com> (accessed March 4, 2008).

open during the Courts' business hours, but the gate was closed. As it was too early for the gates to be closed under normal circumstances, I asked a policeman on duty next to the gate why they had closed it earlier. He responded: "Chabán comes ("viene Chabán"),<sup>138</sup> and indicated an auxiliary door through which I finally exited the building (Figure 7).



**Figure 7. Police deployment at the Judicial Detention Center guarding against protests (Clarín, December 7, 2007)**

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<sup>138</sup> Omar Chabán was the manager of the night club "República de Cromagnon" that was destroyed by fire on December 30, 2004, killing 194 people, mostly teenagers who were attending a rock concert. Chabán faces several criminal charges and his movements are closely monitored by the victims' parents and relatives. During my fieldwork he was held on pretrial detention, therefore, any time he had to plead before the court, he was taken through the judicial detention center on the basement. What the policeman explained to me in just two words "Chabán comes" was that his coming to the *palacio* most likely would trigger of the plaintiffs' anger who radically opposed his release from pretrial detention. On December 7, 2007, the federal court of appeals ordered Chabán's release until the trial which finally began in August 2008. See: "Chabán dejó la cárcel en medio de un gran operativo de seguridad" <http://www.clarin.com/diario/2007/12/07/um/n-01558881.htm> (accessed, March 4, 2008). Remarkably, just across the judicial palace (also on Lavalle square), there is a large signpost with the names of the people who died in the fire at Cromagnon.

## ***Mobility***

The above descriptions seek to convey a concrete sense of “mobility” within the judicial complex—as a matter of fact, even though random searches are conducted at the front door, everybody is admitted to the *palacio*. This mobility is created by the daily flow of people in dynamic interaction with the judicial apparatus and, to a lesser extent, by the apparent absence of physical constraints to move across the building. Adam Reed accounts for a similar sense of mobility encountered in his ethnographic research of Bomana Prison. Mobility, argues Reed, is produced by the constant arrival and release of prisoners, despite restrictions upon movement and coerced dwelling that incarceration imposes: “Metaphors of enclosure and residence are sometimes substituted by language that emphasises the gaol as a site of continuous dispersal. Prisoners are keen to point out the arrivals and departures, the comings and goings of fellow inmates, in particular, the fact that these movements are often unanticipated. No one can be quite sure who might be arriving tomorrow and who might be released.”<sup>139</sup> Nonetheless, he notes that this sense of mobility contrasts to penal routines—“the lack of qualitative change from day to day, month to month”—which inmates experience as “slowing down, a lack of spatial and temporal movement.”<sup>140</sup> The experience of detention cannot be compared to the routines that make up the sense of mobility within the *palacio*. However, in both situations, mobility seems to rest on encounters that rapidly disintegrate. The nature of these encounters is synthesized in the *bus stop* metaphor through which a Bomana inmate explained to Reed his vision of the prison: a place where people from different backgrounds are first thrown together and then scattered.<sup>141</sup> When attention rests on brief intersections, argues Reed, notions of stability and coherence drop away. Drawing on the metaphor of the bus stop, Reeds

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<sup>139</sup> Adam Reed, *Papua New Guinea's Last Place*, 77.

<sup>140</sup> *Ibid.*, 88.

<sup>141</sup> *Ibid.*, 78.

concludes that if the prison can be regarded as a meeting place and site of dispersal, then encounter and mobility become features of incarceration.

The senses of mobility and accessibility enacted within the physical space of the judiciary also help elaborate perceptions about the courts' contemporary practices, as this chapter proposes—after all, *access to justice* and *progress* are principles that animate *per se* the conception of the legal process in Western legal cultures.<sup>142</sup> In her study of the criminal cases filed *ex officio* by the Argentine federal police to the criminal courts with jurisdiction over the City Buenos Aires (courts located in the *palacio*), anthropologist Lucia Eilbaum remarks how her subjects' (criminal court bureaucrats) narratives are organized around a spatial logic.<sup>143</sup> Lower instance criminal judges, in charge of criminal investigation are located on the third floor (“jueces de instrucción”; instructing judges or hearing judges), whereas higher instance criminal courts, the trial courts (“tribunales orales”), are situated on the seventh. Such spatial distribution, she notes, indicates the passage from one instance (lower) to the other (higher). Formally, in Argentina's Criminal Procedural law, the passage from the judge who carries out the investigation to the trial court is called “to elevate the cause to trial” (“elevar la causa a juicio”). Thus, it is frequently said within the Oral Tribunal that cases go “up” to the second instance—when the decision is appealed to the higher court, the Court of Appeals (Cámara de Apelaciones)<sup>144</sup>—or go “down” if they are remanded to the instructing judge. Thus, in these situations, argues Eilbaum, space reflects both the judicial hierarchy and the sequence of the judicial process.

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<sup>142</sup> “Procéder pas à pas; c’est le droit même.” Latour, *La fabrique du droit*, 103.

<sup>143</sup> See: Lucia Eilbaum, *Quando o peixe morre pela boca*.

<sup>144</sup> Federal Criminal Courts of Appeals are nonetheless located on the second floor, lower than that of the instructing judges (pretrial judges), who are on the third. The court of appeals decides in conflicts of statutory interpretation that arise out of decisions of pretrial judges. Accordingly, as Eilbaum recounts, subjects at instruction (pretrial) instance usually speak of cases that go “down” to the court of appeals for decision, and later, when they are already decided, return “up” to the instruction instance to continue the proceedings. In this event, she argues, the spatial logic prevails over [judiciary] “structure” since cases sent to the court of appeals are indeed moving upwards the judicial hierarchy. Ibid.

Turning to the proceedings at the Supreme Court, it is worth noting that access (by access I mean here the passage of cases from the courts of appeals to the Supreme Court) is governed by specific statutory provisions.<sup>145</sup> Additionally, the National Civil and Commercial Procedural Code grants the Supreme Court the authority to reject appeals at its own discretion.<sup>146</sup> Yet, access is also restricted by the Court's bylaws that set up formal requirements for appeal documents (i.e. docket fee; a suits' cover page layout; maximum number of pages for appeals).<sup>147</sup> Nonetheless, the perception of an almost unrestricted access to the Court, that is, the tribunal's availability to hear almost every judicial case in the country<sup>148</sup> is palpable in my informants' accounts of the Court's workings, and references to the Court's case load pervade their descriptions of everyday practices.<sup>149</sup> Moreover, through a discourse that evokes the Supreme Court Justice's metaphor above described, they find the gradual and steady extension of the Court's appellate jurisdiction during the last two decades to be responsible for the tribunal's lost control of its own docket.<sup>150</sup>

Notably, access in my field site also holds political implications. As I will

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<sup>145</sup> Law No. 48, August 25, 1863, R.N. 1863-1869, 49; Decree-law No. 1285, February 4, 1958, B.O.18581,1. Law 48 was modeled on Section 25 of the US Judiciary Act of 1789. See: Jonathan Miller, Maria Angélica Gelli, and Susana Cayuso, *Constitución y Poder Político. Jurisprudencia de la Corte Suprema y técnicas para su interpretación*, (Buenos Aires: Astrea, 1995), 413-414; Helmke, *Courts under Constraints*, 176 note 1.

<sup>146</sup> See: Federal Civil and Commercial Procedural Code, amended by Law 23.744, sections 280 and 285 that grant the Supreme Court the authority to reject appeals on its own discretion. For an extensive discussion about this topic, see Chapter Four of this dissertation.

<sup>147</sup> See, Supreme Court bylaw No. 4, March 16, 2007, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed March 26 2007)

<sup>148</sup> Furthering my informants' point about the absence of restrictions to access the Court, I would like to mention a personal anecdote from the field: in November 2006 while searching for a Supreme Court decision on the Court's on-line database I found a Court ruling in a case in which I had collaborated at its very initial stage in 2002. See: "Castagnaro, Atilio y otros c/ Superior Gobierno de la Provincia de Tucumán (Junta Electoral Provincial)", CSJN, November 14, 2006 [http://www.csjn.gov.ar/documentos/cfal3/ver\\_fallos.jsp](http://www.csjn.gov.ar/documentos/cfal3/ver_fallos.jsp), (accessed November 21, 2006). The appeal filed to the Court challenged the candidacy of Antonio D. Bussi to the City of Tucuman mayoral election due to his active participation in Human Rights violations during the military dictatorship that ruled the country between 1976 and 1982.

<sup>149</sup> Interview, June 22, 2006.

<sup>150</sup> Interviews, March 27, 2006; October 30, 2006; December 21, 2006; February 22, 2007.

show later, access has become a keyword of the Supreme Court Justices' (in particular the newly appointed ones) discourse of change and accountability, and hence this keyword informs new institutional practices of transparency that aim to bring the Court to the people. In this context, access turns into an artefact of performance.<sup>151</sup>

The accessibility and mobility perceived within the *Palacio de Tribunales* certainly challenges the notions of fixity, separation and symmetry of the judicial space outlined by Garapon's canon of judicial architecture reviewed above. This does not mean, however, that they come into conflict with the formalism and detachment associated with the judicial bureaucracy.<sup>152</sup> On the contrary, the artefacts that enact such mobility simultaneously elucidate bureaucracy's workings: elevators, for instance, while acting as sites of intersection and encounter, nonetheless elicit differences by unfolding the judicial hierarchy and separating out the judiciary from the public at large. Likewise, the fences that indicate routines of political mobilizations and demonstrations also demarcate the borders of the protest forum by isolating the Court's floor. Moreover, the recently adopted practices aimed at opening the Court's decision-making process to public participation (i.e. public hearings) build on a dynamic that certainly removes the Court from the public at large, and ultimately excludes the Court from any external gaze.<sup>153</sup> These practices that aim to open access to the Court may be experienced simultaneously as images of physical constraint.

### ***Preserving the Judicial Space***

The materials discussed in this chapter show that place is not a neutral scene; rather, it is one of the forms in which the bureaucratic body is instantiated—a composite of spatial aspects and individual and institutional practices, and even

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<sup>151</sup> See Chapter Five of this dissertation.

<sup>152</sup> Max Weber, "Bureaucracy," in *On Charisma and Institution Building; selected papers*, S.N. Eisenstadt ed. (Chicago: University of Chicago Press, 1968), 66-77.

<sup>153</sup> See Chapter Five of this dissertation.

metaphors,<sup>154</sup> that work to create and perform the Court<sup>155</sup>—as much as the circulation of files, public hearings and documentary practices on which I will elaborate in the next chapters. This questions, therefore, whether judicial practice is constrained within a delimited spatial site. The senses of mobility and access perceived within the *palacio* reveal that knowledge practices also unfold at moments of brief intersections generated by the bureaucratic body's dynamics, challenging, in my view, the conventional understandings of legal knowledge as a localized phenomenon advanced by both the subjects in the Court and scholarly narratives.

Additionally, in the particular context of the Argentine Court practices in which I worked—a post-crisis context which I compared with the process of restoring a building—these mundane idioms, forms, and practices of the judicial bureaucracy<sup>156</sup> become the site where the institution negotiates its own legitimacy. The set of photos displayed in this chapter depict an institutional order which is most obviously visible in the photo of the Justices' conference room with the ten-sided table (Figure 4) where Church (the crucifix), State (the Argentine flag in the glass box) and the ancestors' knowledge (for instance, the ex-Supreme Court Justice's portrait) are symbolically brought together in the room for the Justices' guidance. However, this order is challenged permanently from different instances: the rallies and demonstrations that regularly take place both inside and outside the judicial palace, the Court's current case backlog; and even the new sets of knowledge practices, such as public hearings, which have been enacted in response to the demands for transparency spawned by the 2001/2002 crisis.<sup>157</sup> Notably, despite the tensions that they may generate within the judicial space, these disruptions have become “naturalized,” integrated into the

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<sup>154</sup> For instance, the elevators as indexical of the judicial hierarchies, or the spatial distribution of criminal court as defining the passage from lower instances to the higher ones.

<sup>155</sup> See Chapter Five of this dissertation.

<sup>156</sup> See, also, Chapter Five of this dissertation.

<sup>157</sup> See Chapter Five.

Court's routine. The Court is permanently re-enacted through practices articulated in reaction to the challenges to its order. Indeed, these practices work to re-instate the disrupted order and to reconfigure the proper space of law. To a large extent, these reactions are reflected in the photo of the removable fences located on the fourth floor, near the entrance to the Court's inner chambers (Figure 5). It is through these portable fences (supposedly used in *temporary* instances but now almost a *constant* presence, if only in their very public storage) that the judicial space is materially recovered from any disruption to its order. Through these fences, then, the Court's authority is preserved; in other words: restored.



## CHAPTER 2

### BEFORE THE LAW

Files, documents, and other tools of legal reasoning while distinctive as concrete technical instruments of law may also be appreciated as analytical objects in their own terms.<sup>158</sup> These artifacts lay at the “surface” of legal knowledge; and they are probably the most visible dimension of lawmaking. Indeed, paper trails are the mode through which institutions are analyzed; for instance, scholars scrutinize the workings of courts through the content of legal decisions; lawyers, for their part, interpret these documents as the mode to advance (or not) their clients’ interests; and under current transparency governance, documentary records and self-descriptive documents become the form in which the institution’s good behavior is assessed. However, the mundane and too familiar character of documents—or rather, of the practice of document-making—works to obviate their capacity to become objects of analysis and knowledge themselves. Files, memoranda, and paperwork in general, are seen as routine instruments of bureaucratic practice, the means for achieving an end: the decision, the judgment. Thus, the analysis tends to focus on *results*, the results of institutional acts but not on the process of institutionalization that files entails.<sup>159</sup> In this sense, law is apprehended by its ends (e.g. the social and political interests that the legal decision foregrounds, the individual rights it asserts); and, therefore, the legal analysis tends to be framed within the epistemological boundaries of the same ends.<sup>160</sup>

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<sup>158</sup> See: Annelise Riles, “A New Agenda for the Cultural Study of Law: Taking on the Technicalities,” *Buffalo Law Review*, 53 (2005): 973-1033.

<sup>159</sup> See: Cornelia Visman, *Files: Law and Media Technology* (Stanford, CA: Stanford University Press, 2008).

<sup>160</sup> See Chapter Three of this dissertation. Likewise, Mariana Valverde argues that: “Scholars professionally devoted to the study of law do pay attention to law’s methods, but the majority of such discussions focus on particular court’s interpretation of particular facts and rules.” Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003) 5.

My point in this chapter is that there are instances of judicial practice, other than the decision itself (the outcome, the end), through which legal knowledge can be accessed and apprehended. Specifically, I want to bring attention to the quintessential bureaucratic practice of file-making, as it unfolded in my fieldsite through my investigation into the status of my personal Court dossier. In looking at the dossier as a particular knowledge-making practice, I seek to point toward aspects of legal knowledge that remain a blind spot of legal studies due to the peculiar instrumentality of legal documents. Files and documents are ordinarily regarded as just mediators between the law and the decision; passages from law to execution; what stand before the law.<sup>161</sup> However, it is this intermediary position that files are said to occupy in the legal process which actually turns them into artifacts to access and apprehend the practices of legal knowledge-making. Files speak of events; they record processes; they are constituents of a number of relations of knowledge within the legal apparatus; and even, they set the boundaries of their own reality, of legal knowledge's reality. And as such, they become subjects of critical attention. My interest in files, it is worth noting, is largely instrumental; therefore, other ways of assessing the technologies of documents, for instance, the quest of its normative dimensions,<sup>162</sup> are beyond the scope of this essay.<sup>163</sup> Yet, for the purpose of this study, I use files and dossiers as identical categories. Authors like Goldstein, for instance, distinguish between the file and the dossier where the latter is assumed to be an instrument of surveillance.<sup>164</sup>

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<sup>161</sup> Visman, *Files: Law and Media Technology*, 9, 11.

<sup>162</sup> In this study of the warrant cover used in Bomana Prison, in Port Moresby, Papua New Guinea's capital, Adam Reed recalls Foucault's inquiry into the normative dimensions of documents, and how his insight has strongly influenced scholars. See: Adam Reed, "Documents Unfolding," 158; citing Michel Foucault *Discipline and Punish: The Birth of the Prison*, Alan Sheridan trans. (London: Penguin, 1977).

<sup>163</sup> On the "Ethos of documents," see, e.g., Marie-Andrée Jacob, "Form-Made Persons: Consent Forms as Consent's Blind Spot," 250-2

<sup>164</sup> Abraham S. Goldstein, "Legal Control of the Dossier," in *On Record: Files and Dossiers in American Life*, Stanton Wheeler ed. (New York: Russel Sage Foundation, 1969) 415-443, 415.

### *To have one's day in court*

On December 19, 2005, I was conducting archival research at the Argentine Supreme Court's Library when I received a phone call from a law clerk telling me that he had been informed that there was a file about my research at the Court's General Administration office.<sup>165</sup> I then decided to pay a visit to this office and check the accuracy of the information I was given. At the front desk, a staff member confirmed that there was indeed a dossier named "*Expediente No. 3737/05 Barrera, Leticia (Doctorado en Cornell University Law School) s/pasantía a la CSJN*" (Dossier No. 3737/05 Barrera, Leticia (Doctorate at Cornell University Law School) on internship to the Nation's Supreme Court of Justice) (Figure 8), which, however, I could not have access to at that moment because it was ready to be circulated to the seven Supreme Court Justices for consideration. I replied that I had never presented my work to the Court General Administration and, therefore, I wanted to know who had made such a petition on my behalf. The Court employee replied looking through his personal computer that, as far as he could tell from the electronic records one of the Justices' offices had forwarded a letter to the Court Administration to be analyzed; and that the counseling division ("*Asesoría Jurídica*") of the Administration Office had concluded that all Court Justices should consider such a letter prior to the granting of consent for my "internship" ("*pasantía*") at the Court.<sup>166</sup> He also made it clear that as in any other case that the Court decides, I would need a majority of five affirmative opinions out of seven Justices for my petition to be approved.<sup>167</sup>

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<sup>165</sup> This office handles the tribunal's administrative business.

<sup>166</sup> The officer could not give me any details as to the content of the letter.

<sup>167</sup> This qualified majority (5 out of 7) is explained by the two vacancies in the Court from September 2005 to December 2006. Law 26183 (B.O. December 18, 2006) cut down the number of the Supreme Court Justices from nine to five. However, since the number of Justices was seven at the time the law was passed the same statute established that the Court would be composed provisionally by seven members, and that four (out of seven justices) would make majority. See, also, Chapter Three of this dissertation.

INICIADOR: TRAMITE PERSONAL  
E 000004-00

SOLICITUD

BARRERA LETICIA (DOCTORADO EN CORNELL  
UNIVERSITY LAW SHOOOL) S/PASANTIA A LA CSJN

APR 11 2005  
CORTE SUPREMA DE JUSTICIA  
DE LA NACION

FECHA ALTA DEL DOCUMENTO: 17 DE NOVIEMBRE DE 2005

RECEPTOR : ADMINISTRACION GENERAL DE LA CORTE SUPREMA DE JUSTICIA  
DESPACHO SRA. SECRETARIA LETRADA DRA. ALICIA MARIANI  
I 001029-30

CAD

**Figure 8. Front cover Dossier No. 3737/05 "Barrera, Leticia (Doctorate at Cornell University Law School) on internship to the Nation's Supreme Court"**

The letter that the staff member referred to was one of the introductory letters addressed to the Justices that I had brought to the field in fulfillment of Cornell University's policy on the use of Human Subjects in research. These letters provided a rough description of the ethnographic research I intended to pursue at the Court, explaining such matters as the methods I would apply in the field, my course of action within the institution, and above all, my commitment to confidentiality. From those letters I would like to highlight two sentences in particular:

We will be very grateful if you give permission to Leticia Barrera to conduct field research at the Supreme Court for a period of approximately seven months. During that time, she will be attending public hearings, observing daily office interactions, and conducting participant-observations at the places of your choice.<sup>168</sup>

I had always taken those letters as just an introduction to my research project for my subjects, which also provided informed consent documentation. Yet, I had chosen to deliver them in person to each Justice's office instead of doing it through the Court's front desk ("Mesa de Entradas") to avoid further procedural formalities; and even planned to follow up the Justices' responses to these letters in subsequent visits that I was hoping to pay to their offices. Nonetheless, regardless of how I had intended originally to introduce my work to the Court Justices, the fact that I had chosen to do it in writing meant, in the eyes of the judicial body, that I had filed a petition which should be reviewed and decided upon according to the rules and procedural mechanisms that regulate the Court's workings. To put it differently, what I had

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<sup>168</sup> Excerpt from the letter delivered to each of the Supreme Court Justices on October 25, 2005.

defined as a matter of formal rituals to open the way to research was interpreted and transformed by Court officials into a matter of law.<sup>169</sup>

In recounting how her fieldwork experience was mediated by bureaucratic procedure, anthropologist Jennifer Shannon describes ethnographically how informed consent documents enact “certain kinds of relationality in fieldwork relations.”<sup>170</sup> Drawing on Annelise Riles’s argument that “documents anticipate and enable certain actions by others,” Shannon describes the consent form as an “actant that sets people into action, as well as an institutional symbol in an existing cultural context.”<sup>171</sup> She addresses informed consent from a comparative approach, reflecting on it in two different periods: first, as a staff fieldworker for the National Museum for the American Indian (NMAI) working with Native American communities, and, later, as a Cornell University graduate student in the Anthropology Department working in the same sites. Building upon these two research experiences, she recounts the different responses she received in the field to the consent forms as a representative of these two institutions.<sup>172</sup> She seeks to demonstrate that consent forms are located at the intersection of bureaucratic and ethnographic practice, impacting the nature of fieldwork relations.

What Shannon’s comparative insight suggests is that the more bureaucratically regulated the informed consent becomes the more it takes on the form of established

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<sup>169</sup> See: Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects, Order and Complaint in a New England Court*, (New York, London: Routledge, 1998).

<sup>170</sup> Jennifer Shannon, “Informed Consent: Documenting the Intersection of Bureaucratic Regulation and Ethnographic Practice,” *The Political and Legal Anthropology Review* 30:2, 229-248, 237. See: Annelise Riles, “Introduction: In Response,” in *Documents: Artifacts of Modern Knowledge*, Annelise Riles, ed. (Ann Arbor: The University of Michigan Press 2006), 1-38, 21.

<sup>171</sup> Documents, signatures, and logos all become interpreted differently by those with whom we work, and are incorporated into existing systems of trust (Fluerh-Lobban 2003:173) or distrust.” Shannon, “Informed Consent,” 235.

<sup>172</sup> “Representing the NMAI in exhibitionary practice, the document represented and formalized what was a (desired) relation between Native communities and an institution. However, when the institution of Cornell UCHS<sup>172</sup> was inserted into what otherwise is conceived of as an intimate relation between individuals, the response was more skeptical.” Shannon, “Informed Consent”, 235.

legal practices and, as a consequence, the more it compels “legal relationality.” She notes that the “shift to legality” that is part of institutional review board (IRB) practices today makes both researchers reconceptualize both themselves and the research participants. Researchers are no longer only interlocutors or co-participants with their “research subjects”; they also become “bearers of documents, institutional representatives, cosigners, and consent brokers.”<sup>173</sup> What is more, Shannon finds the relationship between the individual fieldworker and her research participants disrupted by the insertion of the institution into this relationship. Her point is that fieldwork relations—formerly regarded under the rubric of personal relations—must now to be rendered in legal terms. In other words, Shannon empirically encounters in the intersection of bureaucratic practice and ethnographic practice the breaking point of personal fieldwork relationships (the “façade of personal relations,” in her terms) as evidenced in the shift from a “collaborative ethics” (furthered by the ethnographic practice) to a “contractual ethics” (that one advanced by IRB institutional practice).<sup>174</sup> That is, the increasing formalization of ethical practice by IRB enacts a kind of relationality that is different from the one that disciplines such as anthropology privilege.<sup>175</sup>

I recall Shannon’s work here since my initial attention to my dossier focused on how the introduction of “legal oriented” (informed consent) documents representing Cornell University would impact upon what I had imagined as communicative and consensual relationships in my fieldwork. As a matter of fact, as

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<sup>173</sup> Ibid, 237.

<sup>174</sup> Ibid., 239.

Along the same lines, Rena Lederman points to anthropologists’ struggling with the “disconnection between IRB informed consent protocols and ethnographic field ethics.” Rena Lederman, “Comparative ‘Research’: A Modest Proposal Concerning the Object of Ethics Regulation,” *The Political and Legal Anthropology Review* 30 (2): 305-327, 311. Likewise, Amy Swiffen argues that social research ethics have become increasingly framed in legal terms. Amy Swiffen, “Research and Moral Law: Ethics and the Social Science Relation,” *The Political and Legal Anthropology Review* 30:2 (2007): 210-228.

<sup>175</sup> “Ethical practice—in research or any other domain—has an improvisational subtlety that exceeds what can be managed by bureaucratized processes,” Lederman, 306.

an essential part of my research, and even before I was informed about the existence of the dossier, I had begun constructing relationships with other interlocutors in the Court (mostly law clerks) on less regulatory grounds. Therefore, I was afraid the dossier would pose a threat to my future work in the field as I was expecting that bureaucratic practice would demand now that I shift positions: from a researcher to an institutional representative who presented a formal request to the Court, as indicated by the dossier's subject (Figure 8).

Nonetheless, this shift of positions, which under the light of Shannon's work one might attribute to the enactment of IRB regulations for the researcher's fieldwork practice, appeared in my field as the *ordinary* effect of my own engagement with the judicial apparatus, whether this interaction is articulated through informed consent letters or through *any* kind of document submitted to the Court. In other words, when I indicated earlier that Court officials interpreted and transformed in a legal matter what was a question of informed consent, or rather, what I understood was a question of informed consent, that reaction was actually bureaucracy's ordinary response to any written request: the making of a file or a dossier. Yet, such reaction becomes even more commonsensical if we look closely the case of my dossier, as the petition I submitted to the Court had all the formal appearance of an institutional request (e.g. a letter written on university's letterhead, the presence of the institution's logo, the school authorities' signatures). Indeed, for a given problem or petition to be considered by the bureaucratic (legal) apparatus it must be framed in the institution's own terms, that is, subjected to official definitions (as in the case of my request, framed as an "internship request"), and follow pre-determined procedures ("carefully scripted routines," paraphrasing Riles).<sup>176</sup> In this respect, events that one may identify

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<sup>176</sup> Annelise Riles, "The Anti-Network: Global Private Law, Legal Knowledge, and the Legitimacy of the State," *American Journal of Comparative Law* 56 (Summer 2008): 605-630, 629.



as simple matters can be “transformed” into a different kind of subject matter for the Court itself. And the other way around, matters that petitioners understand as appropriate for judicial intervention may be considered as not sufficiently serious for consideration before the Court. In my understanding, this is not a question of the framing (“naming”) capacities of judicial actors,<sup>177</sup> but rather it speaks of the mode of construction and development of a particular form of knowledge: bureaucratic (legal) knowledge.<sup>178</sup>

In the Argentine legal system—as in most civilian legal cultures built upon a marked tradition of written and usually faceless legal procedures<sup>179</sup>—the practice of file-making epitomizes the workings of the judicial apparatus.<sup>180</sup> Indeed, files are mundane objects—if not the most ordinary ones—of a court’s life. They are the forms that set into motion the tribunal’s work dynamics, and organize all its activity, even though this commonsensical quality of files does not yet have its place in legal theory.<sup>181</sup> But even more significantly, files work as the devices that set up the contours to the judicial scope; that is, the search for (legal) truth is achieved,

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<sup>177</sup> See: Barbara Yngvesson, *Virtuous Citizens Disruptive Subjects*, 1-2. See also Chapter Four of this dissertation.

<sup>178</sup> Sociology, anthropology, and even legal scholarship have extensively addressed decision-making in Euro-American cultures as practices that resemble the modes of operation of a professional and depersonalized bureaucracy, as in Weber’s characterization of modern officialdom. Yet, legal knowledge-making itself is assumed to be a form of bureaucratic knowledge; and, in this capacity, it also “shares features of other knowledge systems, such as accounting, audit, science, and even ethnography itself” as noted by a numerous projects in legal anthropology. Barbara Yngvesson and Susan Bibler Coutin, “Backed by Papers: Undoing Persons, Histories, and Return,” *American Ethnologist* 33:2 (2006):177-190, 178. See, generally, Kenneth Dauber, “Bureaucratizing the Ethnographer’s Magic,” *Current Anthropology* 36:1 (1995) 75-95; Marilyn Strathern, *Audit Cultures: Anthropological Studies in Accountability, Ethics, and the Academy* (London: Routledge, 2000); Annelise Riles, *The Network Inside Out* (Ann Arbor: University of Michigan Press, 2001); Bill Maurer, “Anthropological and Accounting Knowledge in Islamic Banking and Finance. Rethinking Critical Accounts,” *Journal of the Royal Anthropological Institute* (N.S) 8 (2002): 645-667.

<sup>179</sup> In Bruno Latour’s words, dossiers are the forms in which every issue is incarnated: “Toute affaire, du moins dans nos pays de droit écrit, a pour enveloppe corporelle une chemise cartonnée liée par des élastiques.” *La Fabrique Du Droit. Une Ethnographie du Conseil d’État* (Paris: La Découverte /Poche:2004) 83.

<sup>180</sup> Max Weber, *Bureaucracy, On Charisma and Institution Building*, Selected Papers, S.N. Eisenstadt ed. (Chicago: The University of Chicago Press 1968), 66.

<sup>181</sup> See: Latour, *La Fabrique du droit*, 83; Cornelia Visman, *Files: Law and Media Technology*, 11.

contested, and negotiated only within the boundaries of the official dossier.<sup>182</sup> Accordingly, fact-finding, witness examination, evidence-collection, legal opinions, and every other judicial proceeding are meticulously recorded in the file, a practice that somewhat resembles double-entry bookkeeping operations. This practice of documenting,<sup>183</sup> however, cannot be taken as just the inscription of words on paper; rather, it accounts for my subjects' commitment to the file as a source of authority.<sup>184</sup> from the point of view of the Court's bureaucrats that I encountered in the field, the dossiers are the venues of knowledge-making; that is to say, that which counts as knowledge is actually that which is *in* the files.<sup>185</sup> An old decision of Argentina's Supreme Court helps illustrate this point: in defining the character of the extraordinary appeal to the Court, the ruling declared that an extraordinary appeal based on an alleged violation of the right to defense in trial *cannot* be admitted if the denial or substantial restriction of such right *does not* emerge from the dossier.<sup>186</sup> This double-negation arising out of this Court's decision actually suggests, in Cornellia Visman's words, "the performative operation of law in constructing reality."<sup>187</sup>

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<sup>182</sup> Interestingly, in advocating for non-judicial mechanisms of dispute resolution such as ADR, one of my informants pointed toward files' 'material' aggregation of knowledge as a logic that *limits* and *constrains* the search of [legal] truth. Interview, November 9, 2006.

<sup>183</sup> Some scholars see the civilian legal culture's emphasis on written documents as a sort of a "text-fetishism." Mariana Valverde, e-mail message to author, June 19, 2008.

Other scholars interpret the influence of legal texts on traditional civilian judging as the manifestation of a dominantly positivist approach to law. See: Carlo Ginzburg *The Judge and the Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice* (London-New York: Verso, 1999).

<sup>184</sup> Jacques Derrida, *Mal de Archivo. Una impresión Freudiana* (Madrid: Trotta, 1997).

<sup>185</sup> Interviews, October 23, 2005; June 22, 2006; August 18, 2006; and February 20, 2007.

<sup>186</sup> "Es improcedente el recurso extraordinario fundado en que se ha violado la defensa en juicio, si *del expediente* no resulta que haya mediado privación o restricción substancial de aquella." CSJN, *Corporación de Transportes de la Ciudad de Buenos Aires v. Compañía de ómnibus "Ciudad de Buenos Aires,"* Fallos 194: 220, 221 (1942).

<sup>187</sup> Cornellia Visman, *Files: Law and Media Technology*, 56.

"*Quod non est in actis non est in mundo* [...] Phrased positively, reality is what is found in files. Any attempt to weaken the file-world, therefore, is obliged to show that files and world do not coincide [...] Files reverse the burden of proof [...] It is up to the world to prove that something which is not on file indeed exists." Ibid.

### *From Authority to Administration*

Writing practice, argues Goody, affects not only lawmaking practices (the reasoning in law, the sources of law) but also the organization of law: “The relationship of law to society becomes formalized with the advent of writing. Since there is no longer a quasi-homeostatic adaptation of norms, the written law achieves a kind of autonomy of its own, as do its organs.”<sup>188</sup> Moreover, Goody relates the evolution of courts as independent bodies with the development of the legal profession. For instance, the growing presence of highly literate specialists encountered both outside and inside the courts, such as advocates who argue clients’ cases before the court and clerks, respectively.<sup>189</sup> And yet, he notes, the internal organization of the courts requires the keeping of records.<sup>190</sup> Judge-made law, Goody remarks, becomes elaborated on the use of precedents; and even records and law reports are useful for “the subsequent checking, control and reviewing of judgment by appeal courts or administrative officers....”<sup>191</sup> This is precisely one of the attributes—and effects—of documents in the bureaucratic organization. As Marie-Andréé Jacob remarks, documents, in particular standard printed forms, provide an “aura of propriety and plausibility”; they answer the bureaucratic needs for efficiency and comparability (of documents), as it has been observed in the history of notary practices in which the *formularies* simplify processes, give practices a routine character, and ensure consistency among documents.<sup>192</sup>

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<sup>188</sup> Jack Goody, *The Logic of Writing and the Organization of Society*, 143.

<sup>189</sup> Ibid. See, also: Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects*, 24, specifically on the evolution of the legal profession through the account of emergence of lay justice in New England before the Revolution.

<sup>190</sup> “The management of modern office is based upon written documents (‘the files’).” Max Weber, *Bureaucracy, On Charisma and Institution Building*, Selected Papers, S.N. Eisenstadt ed. (Chicago: The University of Chicago Press, 1968) 66.

<sup>191</sup> Goody, *The Logic of Writing and the Organization of Society*, 143. On the use of precedents in the Argentine Court, see Chapter Four of this dissertation.

<sup>192</sup> Jacob notes that documents produce different sorts of reliability, depending on specific bureaucratic needs. For instance, under transparency governance, she indicates, “the mere production of documentary accounts describing what one does is considered ethical in and of itself. Marie-Andréé

These insights point toward the notions of durability and authority entailed by writing—and hence, by legal documents and files as the deposits of written law. Indeed, writing, in contrast to speech, is assumed to hold a “potential to be received even more broadly and disseminated beyond the confines of a particular ceremony”,<sup>193</sup> and, as such, to develop a capacity of enforcement that a speech act lacks. But files are also about *administration*; they speak of transfers, exchanges, controlling operations.<sup>194</sup> My interest in files’ instrumentality, as I noted in the introductory section to this chapter, lies at their capacity to work as an organizational and bureaucratic practice, in the understanding that through the process that files set into motion other dimensions of legal knowledge are elicited. These are aspects of bureaucratic practice that are imagined as “something outside of and beyond knowledge”,<sup>195</sup> and that even my subjects in the Court do not regard as knowledge practices.

The ethnographic moment<sup>196</sup> when this insight became palpable to me came at the second or third visit that I paid to the office of one of the Supreme Court Justices to follow up on the status of an interview request I had made through his assistant. On this occasion, the Justice’s assistant asked me if I had made any official presentation before the Court regarding a judicial internship. I replied that I had just handed out

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Jacob “Form-Made Persons: Consent Forms as Consent’s Blind Spot” *The Political and Legal Anthropology Review* 30:2 (2007) 249-68, 251.

<sup>193</sup> Bernadette Meyler, “Daniel Defoe and the Written Constitution”, *Cornell Law Review* 94:73 (2008) 73-131, 124.

<sup>194</sup> Cornelia Visman, *Files and Media Technology*, 4-5.

<sup>195</sup> Annelise Riles, “Real Time: Unwinding Technocratic and Anthropological Knowledge,” *American Ethnologist* 31:3 (2004) 392-405, 398.

<sup>196</sup> As Marilyn Strathern nicely describes, “The ethnographic moment is a relation in the same way as a linguistic sign can be thought of as a relation (joining the signifier and signified). We could say that the ethnographic moment works as an example of a relation which joins the understood (what is analyzed at the moment of observation) to the need to understand (what is observed at the moment of analysis)...Any ethnographic moment, which is a moment of knowledge or insight, denotes a relation between immersion and movement.” Marilyn Strathern, *Property, Substance and Effect, Property, Substance and Effect: Anthropological Essays on Persons and Things* (London & New Brunswick, NJ: The Athlone Press, 1999) 6.

introductory letters from Cornell Law School to each of the Justices' offices but that I had never filed a formal presentation on my own—I purposely avoided to mention that I knew about the dossier that was in circulation among the Justices. The Justice's assistant said that she had seen a dossier circulating with my name on it a few weeks before, and that she remembered *my* petition (she insisted on calling it that) quite well. She added the dossier came from the President's (Chief Justice) office in the Court, information I was not aware of up to that moment because the dossier was still circulating and I had not accessed it. She even went on to mention to me that she had seen a few of the Justices' signatures on the dossier, which meant that they had already taken a position on my “internship” request. When I was to leave the office, after reiterating my interest in meeting the Justice, she said that the overall problem was that my request had been *judicialized* (“judicializado”). And that if I had tried to access the Justices through a “less formal way” (less formal than the introductory letters on Cornell Law School letterhead) I probably would have succeeded in gaining “access” to the Justices.<sup>197</sup> In other words, that my request had been *judicialized* meant, to the eyes of this Justice's assistant, that it was being reviewed through mechanisms that she associated with judicial decision-making practices. Therefore, it was not the issue involved in my dossier that made it appear as a judicial case to her eyes, but the *process* that the dossier was undergoing within the judicial apparatus; specifically, its material circulation that, in the assistant's view, gave the dossier its judicial character.<sup>198</sup>

The moment was even more insightful since at the initial instance of my following the dossier's path, my interlocutors—the staff at the Court's general administration desk, two administrative law experts with whom I had previously

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<sup>197</sup> Fieldnotes, March 17, 2006.

<sup>198</sup> “...depuis qu'il est entré au greffe, toute opération sur le dossier devenu juridique peut entraîner, comme on dit, des ‘effets de droit’...” Latour, *La fabrique du droit*, 93.

discussed my “procedural” movements regarding my dossier, had insisted on framing my dossier as an “administrative issue” as opposed to a “judicial case.” I further endorsed this framing by splitting my interest in what appeared to be two different and parallel topics of research, the Court’s judicial adjudication operations, on the one hand, and the Court’s administration or management activities, on the other. In fact, besides judicial adjudication, the Court decides on administrative matters that involve its daily operations. For instance, it deals with issues involving personnel, payroll, internal procedures and organization, budget, facility management, etc.<sup>199</sup> Moreover, the Court’s administrative activity is often materialized in general agreements reached by the Court’s Justices, so-called “acordadas” (that often work as the tribunal’s bylaws), resolutions issued by the Court’s President (“resoluciones”), and other kinds of legal documents with no particular denomination, for example, the Court’s decision on my case, generically called “providencia.”<sup>200</sup> Court judgments on judicial cases are regularly called sentences (“sentencias”), yet, the Court’s discursive practices change depending on whether the tribunal issues an *acordada* concerning an administrative matter or rules in a judicial case. Notably, there are differences between the mode in which the Court addresses itself in the text of a judgment and the way it addresses

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<sup>199</sup> In both Civil Law and Common Law systems scholars have traditionally argued that the administrative function, as “materially” or “substantially” defined, can be exercised not only by the Executive Power —the administrative body *per se*— but by the Legislative and Judicial Powers as well. For studies about the administrative activity of the state in common law jurisdictions (U.S.), see, e.g.: Peter L. Strauss, *Administrative Justice in the United States* (Durham, NC: Carolina, 2002); Peter L. Strauss, Todd D. Rakoff and Cynthia R. Farina, *Administrative Law, Cases and Comments*, Revised Tenth Edition (New York: Foundation Press, 2003). For civilian jurisdictions, see, e.g.: Miguel Marienhoff, *Tratado de Derecho Administrativo*, Tomo 1, 4ª Edición actualizada (Buenos Aires: Abeledo Perrot, 1990); Juan Carlos Cassagne, *Derecho Administrativo*, Tomo 1, edición actualizada (Buenos Aires: Lexis Nexis Abeledo Perrot, 2006); Agustín Gordillo, *Tratado de Derecho Administrativo*, Tomo 1, Parte General (Buenos Aires: FDA, 2003).

Argentine Administrative Law in particular establishes a broad definition of administrative action; and the Argentine “doctrina” (legal academic writing) and “jurisprudencia” (jurisprudence) acknowledge the concept of an “administrative function or activity” within the judiciary (Supreme Court and lower courts). See: Maria C. Jeanneret de Pérez Cortés, “El control judicial de la función administrativa de los poderes Legislativo y Judicial,” *El Derecho* (t. 2001/2002): 678-694.

<sup>200</sup> In the Argentine Procedural Law, “providencias” are minor decisions taken in the course of a judicial process, mainly on procedural matters.

itself in an *acordada* or administrative decision. Accordingly, judgments are presented as decisions reached by “la Corte” or “esta Corte” (“the Court” or by “this Court,” meaning the Court as an *institution*) whereas *acordadas* are taken by “los Ministros” (the Court Justices) and signed by the Court general manager (“administrador general”). A Court Justice explained to me this “double-subjectivity” game in these terms: in the first case, when the Court plays a “judicial role,” “it is the Court who speaks,” a state power; in the second, when the Court decides as an administrative body, “it is *us*.”<sup>201</sup>

The judge, indeed, speaks of judicial decision-making as a result, of an end; that is, the law that is transmitted through a judgment or a bylaw, whereas the assistant’s view of the Court’s decision-making as a process actually points toward the “transmission medium itself.”<sup>202</sup> In my opinion, this finding, which became even more apparent to me through my follow up of the circulation of my own dossier, breaks up any functionalist divide between judicial and administrative matters and brings to the surface the material aggregation of documents as a legal bureaucracy’s knowledge practice, with no distinction as to whether the Court rules on relevant judicial cases, like past human rights violations, or whether it decides on quotidian, mundane matters, such as my interview request (or “internship,” glossing the Court’s terminology). What is more, it advances the appreciation of legal knowledge as part of a larger network of knowledge practices rather than as an isolated outcome—the judgment—or the creativity of individual agents.<sup>203</sup>

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<sup>201</sup> Interview, August 16, 2006.

<sup>202</sup> Cornelia Visman, *Files: Law and Media Technology*, 75.

<sup>203</sup> See Chapter Four of this dissertation

### *The Agency of Legal Documents*

In his essay “Forms,” Charles M. Yablon provides a description of the summons, probably the most routine legal form in a civil action.<sup>204</sup> In examining the materiality of the summons, for instance, the written statement and the blank spaces, he points out sets of relations that this ordinary legal document enacts and anticipates. Yablon, however, focuses more on the meaning of forms as instruments of surveillance than on making them visible as constituents of social relations. Accordingly, he pays particular attention to the indeterminacy of the legal language of the summons, which, drawing on Derrida’s insight that meaning does not reside in a text but in the writing and reading of it,<sup>205</sup> he sees as reflecting “an overabundance of meaning, of denotations and connotations, of words that mean many things at once.”<sup>206</sup> But words in context (in a Derridean sense), like the context of given summons, “are not malleable putty that can mean anything we desire.”<sup>207</sup> In other words, what Yablon remarks is that the summons, understood in the context of its conditions of production and reading, also becomes an “instrument of power and pain.”<sup>208</sup>

Certainly Yablon’s attention focuses on the disciplinary aspect of legal forms. However, in one sense, his account becomes important to my own approach to legal documents. Although he does not say it explicitly, what he foregrounds in his study of

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<sup>204</sup> More specifically, he describes the summons based “on the form set forth in Form 1 of the Appendix of Forms as issued pursuant to Rule 4 of the Federal Rules of Civil Procedures,” Charles M. Yablon, “Forms,” *Cardozo Law Review* 11:5 (1990):1349-1353.

<sup>205</sup> See: Ian Hodder, “The Interpretation of Documents and Material Culture,” in *Handbook of Qualitative Research*, Second Edition, Norman K. Denzin and Yvonna S. Lincoln ed. (Thousand Oaks, California: Sage Publications 2000),703-15, 704.

<sup>206</sup> Yablon, “Forms,” 1352.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid, 1353.

In a different context, Riles addresses the form as a self-contextualizing entity: “the gaps in the form to be filled in contain within themselves all the terms of analysis one would need to understand to complete them.” Annelise Riles, “[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis,” in *Documents: Artifacts of Modern Knowledge*, Annelise Riles ed. (Ann Arbor: The University of Michigan Press, 2006), 71-92, 20. See also: Riles, *The Network Inside Out*.



the summons is the character of the legal form as an agent—or an actant in Science and Technology Studies’ language. Accordingly, the summons compels and anticipates different kinds of reactions by the subject: “the summons is all about the things you *must* do”<sup>209</sup>—thus, it is also expected that “you may fail to live up to expectations.”<sup>210</sup> As Yablon’s account suggests, legal forms are a point in a chain of relations (rules, plaintiffs; defendants, lawyers, clerks, deadlines judgment, among others) that make up the legal process.<sup>211</sup> “The summons presumes, without ever stating them, the existence of clear, mandatory, determinate rules, time deadlines, rules for counting, expected actions, forbidden actions.”<sup>212</sup>

Legal documents’ capacity to anticipate and enable responses and relations—as well as to condition and constrain them—actually indicates that “once created, instruments take on a certain agency.”<sup>213</sup> For instance, this agency is apparent in Yablon’s description of the plaintiff and defendant of the summons not as authors of the documents, but as their *subjects*: “When the blank spaces are filled in in some lawyer’s office, the plaintiff’s name will sit uncomfortably just above yours [the defendant] in the caption of the case. It will be neither larger nor smaller than yours and will be separated from your name merely by the interposition of the printed “v.” That letter “v.” is a part of the form. It is the part of the form which places you two, plaintiff and defendant, literally and figuratively, on opposite sides.”<sup>214</sup>

In pointing out the intimate relationship between the aesthetics of the summons and its informational content<sup>215</sup>—a relationship also encountered in other artifacts of

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<sup>209</sup> Yablon, “Forms” 1349.

<sup>210</sup> Ibid., 1352

<sup>211</sup> See, e.g.: Bruno Latour, *La Fabrique du droit. Une ethnographie du Conseil d’Etat* (Paris: La Découverte /Poche 2004).

<sup>212</sup> Yablon, “Forms,” 1351.

<sup>213</sup> Riles, “Introduction: Making Sense of the Means: Private Governance and the Legal Technologies of Collateral” in *Collateral Knowledge: Legal Reason in the Global Financial Markets* (forthcoming).

<sup>214</sup> Yablon, “Forms,” 1350.

<sup>215</sup> Annelise Riles, *The Network Inside Out*, 131.

bureaucratic knowledge, such as the consent forms<sup>216</sup>—Yablon actually foregrounds the agency of the legal form. “You have been drafted by a document,” he concludes; meaning that you became a defendant, a subject, by the action of the document. Nonetheless, this does not mean that human agency is obviated in the constellation of relations that the summons brings about.<sup>217</sup> Rather, it assumes another form, distant from the core assumption that human agency can be linked only to will or intention.<sup>218</sup> In certain ways this resembles the practices of consent fabrication in a hospital bureaucracy, as described by Jacob, where agency takes up the form of submission to the hospital bureau’s rules.<sup>219</sup>

Along the same lines, Riles’s description of the practices of posting of collateral for the global swap markets in Tokyo shows how many aspects of the routine practice of swap trading are organized and performed around specific pre-printed forms. Accordingly, she remarks that legal documents work as “technologies for engaging in a communicative routine” which consists “of a set of material practices of document production, filing, and exchange—practices that in turn call for further practices, further documents.”<sup>220</sup> This routine, however, is enabled not by a shared set of norms but by the forms’ aesthetic criteria<sup>221</sup> which demand from their users specific forms of behavior.<sup>222</sup> In this sense, Riles remarks that “the document

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<sup>216</sup> Jacob, “Form-made persons,” 253.

<sup>217</sup> Yablon, 1350

<sup>218</sup> See: Marilyn Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things*, 17; James Leach, “Modes of Creativity,” in *Transactions and Creations: Property Debates and the Stimulus of Melanesia*, Erich Hirsch and Marilyn Strathern eds. (New York, Oxford: Berghahn Books, 2004) 152.

<sup>219</sup> Jacob, “Form-made persons,” 263-4.

<sup>220</sup> Annelise Riles, “The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State,” *American Journal of Comparative Law* 56 (Summer 2008): 605-630, 620. See, also: Annelise Riles, “[Deadlines] Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis.”

<sup>221</sup> As Riles notes, unlike letters, legal opinions, or e-mail messages, printed forms are distinguishable by their “very rigid aesthetic standards.” Riles, “The Anti-Network,” 620.

<sup>222</sup> “One chooses the law that applies to the ISDA master agreement by circling the proper word; one delineates who is the responsible contact person for the agreement by completing the relevant box. The form is not set out to be read; it is presumed that the “users” (the term is significant) will jump to the

prefigures, and makes possible a set of exchanges defined by the particular kind of knowledge at issue, technical knowledge.<sup>223</sup>

What can be said of legal forms also can be applied to files. Every file note, explains Visman, “indirectly contains a command”;<sup>224</sup> files hold imperatives that set off chains of reactions;<sup>225</sup> formulas that enclose themselves the execution of official acts: for instance, as in the case of my file, to circulate the file for Justices’ opinion, to grant me access to read the file, to send the file to the Court’s archive when the legal process was finished, to take the file out of the archive upon my request, all proceedings that reflected my file’s own progression.<sup>226</sup> “Reporting the execution of an order triggers the next one,” notes Visman, pointing out the double orientation of an executed command: “it generates the next command and notes its own execution. It is both imperative and information.”<sup>227</sup>

Either directly, as in the case of Riles, or not, as in Yablon’s and Visman’s works, in my opinion, they all resonate with paradigms developed within of Science and Technology Studies (STS) about the character of scientific and technical knowledge. Specifically, Bruno Latour’s effort to understand the character of legal knowledge by focusing on the material quality of lawmaking—the production and passage of legal texts, opinions, drafts, reports, that make up the legal decision—as observed in his extensive empirical study of the *Conseil d’État*.<sup>228</sup> STS, and in particular ANT (Actor-Network Theory), refuses to grant any “epistemological

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blanks, and complete them, most likely in the order they appear. The collaboration made possible by the printed form is certainly consequential, in other words, but it is also normatively and socially thin.”  
Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Cornelia Visman, *Files: Law and Media Technology*, 8.

<sup>225</sup> Ibid.

<sup>226</sup> As a matter of fact, I was able to track down who was reviewing it, in whose office the file was at different times, even though I was not allowed to access it due its “circulating” status. Fieldnotes, December 22, 2005; March 16, 2006; June 2, 2006.

<sup>227</sup> Visman, *Files: Law and Media Technology*, 8.

<sup>228</sup> Latour, *La Fabrique du droit*. See, also, Chapters One and Four of this dissertation.

privilege to human actors”<sup>229</sup> Indeed, in the approach to the study of scientific knowledge production that ANT advances, human, scientific and technical instruments, and even theory, emerge through the things they do; they are treated all as inputs, *actans*, parts of the network of knowledge production.<sup>230</sup> This insight, however, does not mean to just ascribe human agency to nonhumans because that would imply there is a true agency and a false one.<sup>231</sup> Instead, “the point is to focus on the *enrollment* of humans and nonhumans in the production of a scientific (or a legal) fact.”<sup>232</sup> (*italics in the original*). As I noted in the introduction to this dissertation, I find this insight particularly helpful as a methodological approach<sup>233</sup> as it furthers the appreciation of legal knowledge as part of a larger network of knowledge practices rather than as an isolated outcome—the judgment—or the creativity of individual agents.

### ***Focusing on the Means***

The clerical movement of files that I encountered within the Argentine institution produces an effervescence of papering practices that are manifest in different interventions performed *for* and *in* the dossier: resolutions, legal opinions, memoranda, reports, conclusions, and exchanges among judicial bureaucrats.

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<sup>229</sup> Ron Levi and Mariana Valverde, “Studying Law by Association: Bruno Latour Goes to the Conseil d’État,” *Law and Social Inquiry* 33:3 (2008): 805-25, 809.

<sup>230</sup> “The great interest of science studies is that offers, through the study of laboratory practice, many cases of the emergence of an actor. Instead of starting with entities that are already components of the world, science studies focuses on the complex and controversial nature of what it is for an actor to come into existence. The key is to define the actor for what it does—its performances—under laboratory trials. Later its competence is deduced and made part of an institution. Since in English “actor” is often limited to humans, the word “actant,” borrowed from semiotics, is sometimes used to include nonhumans in the definition” Bruno Latour, *Pandora’s Hope*, 303.

<sup>231</sup> Bruno Latour, *Reassembling the Social, An Introduction to Actor-Network Theory* (Oxford: Oxford University Press, 2007), 55.

<sup>232</sup> Levi and Valverde, “Studying Law by Association,” 809.

<sup>233</sup> I agree with Riles, and Levi and Valverde that in some ways Latour’s highly empiricist claim sets up the limits to his account of how truth is produced in law as he ends up making more general truth claims about the manufacture of law from his observations at the *Conseil*. See, Annelise Riles, “Comparative Law and Socio-Legal Studies,” in *The Oxford Handbook of Comparative Law*, Mathias Reinman and Reinhard Zimmerman eds Oxford: Oxford University Press, 776-813, 811; Levi and Valverde, “Studying Law by Association.”

Documents are attached (as different layers, one below the other) in the order of circulation of a given file, to the point that my subjects tend to measure the size of the file by the “thickness” of the layering. Thus, if there are different legal opinions on a case, all of them are probably enclosed in the dossier through their accompanying memoranda, each of which explain the reasons for the different judicial decisions proposed in the same case.<sup>234</sup> Additionally, my interlocutors in the Court, mostly clerks, tend to give an account of their own lawmaking practices—and in general of the Court’s—in terms of this continuous movement of documents: dossiers are documents that constantly *come in* to their offices for review, and *go out* for others’ (other clerks and judges) review.<sup>235</sup> Therefore, this constant circulation of files appears as both the engine and demise of judicial bureaucrats’ practices.

The “collective manipulation of the dossier,” that is, the review, discussion, and deliberation on the dossiers that circulate within the judicial apparatus, becomes in Latour’s view the essential component to understand how the law, or rather the *Conseil d’État*, works.<sup>236</sup> For Latour, the passage of files entails a complex process of transformation through which facts become annexed, assembled, juxtaposed to the preceding legal text, and ultimately transformed, to the point that he compares this transformation with the workings of an industrial boiler.<sup>237</sup>

In other words, the textual process that the circulation of files generates in the Court’s routine makes visible files’ capacity to operate as a technology of bureaucratic action, as a means to an end: the legal decision. Files, indicates Visman, work toward

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<sup>234</sup> These documents are not attached to the main dossier actually; rather, they are enclosed in an accompanying yellow paper folder that circulates along with the dossier. See Chapter Four of this dissertation.

<sup>235</sup> Interviews, October 21, 2005; November 2, 2005; December 16, 2006; January 30, 2007; February 13, 2007, July 25, 2008;

<sup>236</sup> Si l’observateur est myope, le droit est procédurier: œil pour œil, dent pour dent... En suivant obstinément nos chemises cartonnées, en remarquant comment elles se chargent, se plissent et se nourrissent, en notant les placards, bureaux, couloirs, caves, fauteuils ou chaises sur lesquels on les fait vieillir, nous repérons les différents métiers du Conseil. Latour, *La fabrique du droit*, 96.

<sup>237</sup> Ibid. 105

the law; “they lay the groundwork for the validity of the law,”<sup>238</sup> but they are not the law. However, by focusing on files’ mundane execution of the legal procedure and official acts, one is allowed to access legal knowledge from instances that remain impervious to the analysis if one concentrates on the study of the law itself—of its ends. Yet, as I elaborate further in the next chapters, these instances are moments of knowledge creation and expansion.<sup>239</sup>

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<sup>238</sup> Cornelia Visman, *Files: Law and Media Technology*, 13.

<sup>239</sup> See Chapters Three and Four of this dissertation.

## CHAPTER 3

### THE FORMS OF LEGAL EXPERTS

This chapter builds upon another artifact of legal knowledge-making practices: the subjects of the practices of adjudication, as encountered in the Argentine Supreme Court. The attributes of judicial officials, their relationships, and the manners in which they decide have been widely examined by socio-legal scholars, as in Critical Legal Studies and Law and Society literatures. However, rather than assuming—as in many of these analyses—that these subjects, in particular judges, are ideological actors,<sup>240</sup> or that their behaviors are guided by political interests,<sup>241</sup> here, I want to “step back” and look at instead the persons and relations that the practices of legal knowledge-making unfold within the judicial bureaucracy.

I focus my attention on law clerks, whose figures, albeit conceptually present in any description of the judicial organization, are nonetheless often overlooked when the study privileges the analysis of the legal decision or modes of legal reasoning, and hence, assigns judges the most salient role. From this view, law clerks are typically perceived and portrayed as impersonal and interchangeable in the bureaucratic logic.

My account, in contrast, suggests that law clerks are not clothed in the aporia of bureaucratic indifference. Rather, they emerge as prominent figures of day-to-day legal bureaucratic practices. Clerks, as I explain below, can work either for a Supreme Court judge or for one of the Court judicial secretaries. They draft legal opinions, write memoranda, conduct research, and even may hold private “hearings”<sup>242</sup> with counsels and the parties to a case. But yet, I refuse to describe them as merely

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<sup>240</sup> See: Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge, Mass: Harvard University Press, 1997).

<sup>241</sup> See, e.g.: Gretchen Helmke, *Courts under Constraints: Judges, Generals and Presidents in Argentina* (Cambridge: Cambridge University Press, 2005).

<sup>242</sup> See Chapter Five of this dissertation.

assistants to the judges, who may help them bring about an outcome: the legal decision or judgment. Therefore, to appreciate the actual dimension of the clerks' figures as they unfolded in my fieldwork, I propose to examine their interventions within the judicial bureaucracy; specifically, to go back to the quintessential practice of file-making as described in the previous chapter. Indeed, files, as analytical tools, may enact different forms of knowledge of these subjects of bureaucracy, which, particularly in the Argentine context, may contribute to move beyond the modern/pre-modern, objective/subjective, stable/erratic dichotomies through which legal bureaucrats' behaviors are often depicted. In other words, a look at the Court's documentary practices enables a more differentiated portrayal of the knowledge relations that develop among judicial bureaucrats.

Law clerks are first encountered through a schema of division of labor based on the clerical posts they are formally assigned within the judicial structure. In this light, I will argue, making connections with Marilyn Strathern's ethnography of Melanesia,<sup>243</sup> that the figures of clerks become palpable through the documents they create throughout the judicial process. But yet, drawing again on Strathern's insight, I will also argue that the fact that clerks become visible from the vantage point of these documents does not preclude them from also being rendered apparent and cognizable from another point of view,<sup>244</sup> which, however, is not accessible to outsiders. From this internal point of view, also instantiated by the circulation of documents (files), clerks are apprehended not as documents but as persons themselves. Using a clerk's account of her work, I will attempt to connect these perspectives.

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<sup>243</sup> Marilyn Strathern, *The Gender of the Gift. Problems with Women and Problems with Society in Melanesia* (Berkeley, CA: University of California Press, 1988).

<sup>244</sup> See, e.g.: Annelise Riles, "The Legal Person: An Anthropological Approach to Corporate Debt" (paper presented at the conference "Legal Knowledge and Anthropological Engagement" in honor of Professor Marilyn Strathern, Cambridge, U.K., October 3-4, 2008).



### ***Encountering legal expertise: law clerks***

In addition to the seven Justices—so-called *ministros* (ministers) in the Argentine judicial lexicon—who currently sit on the bench, there are several lawyers who work for the Court. Lawyers may clerk for a Court Justice as his or her staff attorney, in which case they work as law clerks (*secretario* or *prosecretario letrado*) in a Justice's *vocalía*, that is, a Justice's office. Alternatively, lawyers may work also as law clerks for one of the eight Court judicial secretaries or judicial desks (*secretarías judiciales*), each of which is chaired by a Court clerk, so-called *secretario de la Corte Suprema* or just *secretario*,<sup>245</sup> and specializes in a different branch of law. Accordingly, the first *secretaría* handles Civil and Commercial Law issues; the second, cases on Civil and Social Security Law; the third entertains Criminal Law matters; the fourth, Administrative Law or Public Law; the sixth, Labor Law; the seventh, Tax Law, Customs and Banking affairs; and the eighth studies cases of original jurisdiction. The fifth, which had been inactive for years, was recently “re-launched” as the secretary that handles “cases of institutional importance or of interest for the public.”<sup>246</sup> Additionally, there is a *secretaría* of jurisprudence and comparative law.

Both law clerks and Court clerks are called *funcionarios judiciales* (judicial bureaucrats, civil servants), which is indicative of clerks' high-ranking in the judicial hierarchy. Indeed, as many clerks pointed out when I first met them, law clerks hold the equivalent ranking of first-instances judges,<sup>247</sup> and Court clerks are comparable to

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<sup>245</sup> At present only the desk of jurisprudence is chaired by a woman. Only 5 women have held the position of Court clerk, two of them have been in charge of the desk of jurisprudence.

<sup>246</sup> See: Supreme Court bylaw No.18, May 30, 2006, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed March 15, 2008). This *secretaría* does not specialize in issues related to a particular branch of law, but considers cases that either all Justices, or the Chief Justice by himself, may deem relevant for public opinion, such as a class action on water pollution issues, the annulment of laws precluding criminal prosecution of human rights violators in the latest dictatorship.

<sup>247</sup> See; Supreme Court bylaw for the National Judiciary, December 17, 1952, 224 Fallos 575 (1952), section 102 *bis*.

appeal court judges.<sup>248</sup> The pairing of the figures of clerks with those of judges is actually materialized in the salaries that law clerks and Court clerks receive. What seems more important to the day-to-day Court's practices, however, is the symbolic capital<sup>249</sup> that these legal experts acquire through their association with judges—competence, status, authority, are the salient features that differentiate clerks from other judicial staff members.<sup>250</sup> Nonetheless, the following account by one of my subjects, an ex-Court clerk who was appointed later as a court of appeal judge, about her reasons for becoming a judge explains what the coupling of judges and clerks actually leaves out:

Certainly I did enjoy the same *status* there at the Court as I am holding now as a judge and earned the same salary as an appeal court judge; but after so many years in the Court there is a moment in which you do not want to write for another person; you want to have *jurisdiction* of your own...Here, in the court of appeals it is you, the judge, who holds the authority to adjudicate, here *you sign your own decision*, while in the Court there is 'another' [the judge] who decides; it does not matter that you have drafted yourself the decision; what finally matters is who *takes* it.<sup>251</sup>

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<sup>248</sup> Ibid, section 88.

<sup>249</sup> See: Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Review* 38 (1987):805-53.

<sup>250</sup> For instance, of the two "exclusive" (or private) elevators existing in the Court's building, the Tribunals' Palace, (*Palacio de Tribunales*), one is assigned to Supreme Court Judges, and the other to the lower-court judges, clerks and other high-ranking judicial bureaucrats. See the Chapter One of this dissertation.

<sup>251</sup> Interview, December 10, 2006.

The number of Court clerks and law clerks working at the Court has increased gradually. This is particularly so for law clerks.<sup>252</sup> In 1990, a Court-packing plan promoted by then-President Carlos Menem (1989-1999) that enlarged the Court from five to nine Justices,<sup>253</sup> also expanded the number of law clerks dramatically: from approximately thirty in the 1980s to over 150 by the mid-1990s.<sup>254</sup> A few clerks among those I interacted during my fieldwork (from August 2005 to March 2007) estimated their actual number to be about two hundred.<sup>255</sup>

The post-enlargement Court (so-called “the Menem’s Court”)<sup>256</sup> has been highly criticized.<sup>257</sup> However, these critiques focused on more normative and political aspects of the enlarged Court’s workings and decisions. But the enlargement also has affected somehow the way in which judicial bureaucrats imagined and performed their

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<sup>252</sup> The Court has been established in 1863; the first clerkship position was created in 1865. See: Miguel Danelián and Claudio Ramos Feijoó, “Secretarías Judiciales de la Corte Suprema de Justicia de la Nación,” *La Ley* Sec. Doctrina (B) (1990): 1218-1225.

<sup>253</sup> In 2006, Congress passed a law cutting down the number of Supreme Court’s Justices to five. However, since the number of Justices was seven at the time this law was enacted, it, therefore, was statutorily established that the Tribunal would be composed provisionally by seven members—and that four (out of seven justices) would make majority. See: Law No. 26183, December 18, 2006, B.O. 31055, 1.

<sup>254</sup> See: Horacio Verbitsky, *Hacer la Corte* (Buenos Aires: Editorial Planeta, 1993) 75; Gretchen Helmke, *Courts under Constraints: Judges, Generals and Presidents in Argentina*, 179.

<sup>255</sup> Sabelli breaks down this number among clerks who actually assist the judges and the *secretarías*, and other lawyers who, holding the position of clerks, perform other kinds of jobs (i.e. at the Court Library, the Court general administration, etc.) Héctor E. Sabelli, “Cómo trabaja la Corte,” *Jurisprudencia Argentina Suplemento I* (2007): 3-11.

<sup>256</sup> Also called “the Menem’s Court,” since the post-enlargement Justices ended up grouping themselves in a so-called “automatic majority,” partial to the Menem administration’s position in every pressing political issue decided by the Court. See Jonathan Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process,” *American Journal of Comparative Law* 51 (2003):839-885; Roberto Gargarella, “In search of a Democratic Justice-What Courts Should Not Do: Argentina 1983-2002,” in *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, Siri Gloppen et al. eds. (London: Frank Cass, 2004), 181-197.

<sup>257</sup> See, e.g.: Raúl Baglini, Ángel D’Ambrosio et al, *Juicio a la Corte* (Buenos Aires: Mekanografix, 1993); Verbitsky, *Hacer la Corte*; Eduardo Oteiza, *La Corte Suprema: Entre la justicia sin política y la política sin Justicia* (La Plata, Buenos Aires: Editora Platense S.R.L., 1994); Alejandro Carrió, *La Corte Suprema y su independencia* (Buenos Aires: Abeledo-Perrot, 1996); Roberto Gargarella, *La Justicia frente al gobierno: Sobre el carácter contramayoritario del poder judicial* (Barcelona: Ariel, 1996); “In search of a Democratic Justice-What Courts Should Not Do: Argentina 1983-2002”; Jonathan Miller, “A Typology of a Legal Transplant”; Gretchen Helmke, *Courts Under Constraints*.

sociality. As it emerges from clerks' accounts, in particular, those who entered the Court in the mid-1970s, perceptions about the Court as a site in which people knew each other dominated the field;<sup>258</sup> "each *Ministro* (Justice) had only one or two clerks,"<sup>259</sup> a clerk explained to me. Another clerk, appealing to a kinship metaphor, remembers the pre-enlargement Court as a *family*: "Every morning the justices stopped by the clerks' offices to check if everything was okay and to ask if we needed anything...we were like a little family...with the Court's enlargement, this went out of our hands...."<sup>260</sup> Remarkably, from another perspective, critical to this clerk's invocation of kinship, a younger clerk makes sense of the family metaphor in these terms: "They [older clerks] speak about the 'Court of 5' (five justices), an elite Court,<sup>261</sup> as the best Court ever, not because of its members' intellectual skills—actually they were better—but because of the Court's *size*; it was a small Court and they *knew* one another."<sup>262</sup> She continued, "Though *Menenismo*<sup>263</sup> changed many things dramatically in the Court, for the worse, it also made the Court a more accessible place."<sup>264</sup>

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<sup>258</sup> Interviews, December 16, 2005; November 29, 2006; December 22, 2006; December 22, 2006; January 15, 2007; and January 30, 2007.

<sup>259</sup> Interview, January 15, 2007.

<sup>260</sup> Interview, December 22, 2006.

<sup>261</sup> Sociologist Ana Kunz (1989) has elaborated on the social profile of the Argentine Supreme Court Justices between 1930 and 1983. She inquires into aspects such as the justices' places of birth, legal training, and social origins, exploring the working relations between justices' social origins and their attitudes toward religion, and that between magistrates' social origins and type of government (democratic rule or military rule) under which they came to power. She also pays attention to the Justices' ideology, their specialization in private or public law, their scholarly activities and involvement with academia and/or politics. Kunz concludes that almost half of the Justices of the Supreme Court had been drafted from the highest social strata (aristocracy and upper-class) during democratic rule. The representation of these strata reached almost the two-thirds of the total of the Court members during periods of military rule. In addition, Kun argues that the Supreme Court magistrates' high participation in university teaching helped improve their prestige *vis-à-vis* other social sectors that perceived such activity as a guarantor of authority and furthered the image of the Court as an elite institution (1989:30). Ana E. Kunz, *Los Magistrados de la Corte Suprema de la Nación (1930-1983)* (Buenos Aires: Instituto de Investigaciones Jurídicas y Sociales Ambrosio L. Rioja, Facultad de Derecho y Ciencias Sociales Universidad de Buenos Aires, 1989).

<sup>262</sup> Fieldnotes, December 19, 2006.

<sup>263</sup> See: *supra* note 258.

<sup>264</sup> Following Kunz's insights, one might interrogate whether the enlargement actually opened

Notably, the idea of the Court as a family (or the judiciary, in general), is the rubric upon which indigenous representations of the Argentine judicial system are usually constructed. Indeed, kinship becomes a ubiquitous analytical category in scholars' attempts to explain not just the Court's workings but also those of other judicial instances,<sup>265</sup> to the extent that it is presented as a competing (pre-modern) logic defying the judicial bureaucracy's rationality.<sup>266</sup> Accordingly, the judiciary is portrayed as a double-faced body: on the one hand, a modern institution, a bureaucratic apparatus, governed by universal and general rules; and, on the other hand, a world of personal relations characterized by a pervading *clientelismo* (a clientele, patronage system), status, and hierarchy. These apparently contradictory "worlds," the argument goes, nonetheless operate in a relationship of reciprocal reflexivity: they feed and complement each other.<sup>267</sup> From this point of view, kinship is encountered in multiple forms within the judiciary ("it changes according to the context and the actor who enunciates it");<sup>268</sup> it can be defined in terms of blood (the biological family); or "contingently crafted and mobilized "for specific purposes (i.e. appointments and promotions), that is, as "fictive' kinship."<sup>269</sup> It is even employed in a metaphorical meaning when it refers to the "judicial family" ("the union and corporative defense of the judicial power").<sup>270</sup> In my opinion, to assume kinship as an

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the Court to lower social strata, as this clerk's account suggests. See: Ana Kunz, *Los Magistrados de la Corte Suprema de la Nación (1930-1983)*.

<sup>265</sup> Maria José, Sarabayrouse Oliveira, "La Justicia Penal y los universos coexistentes. Reglas universales y relaciones personales," in *Burocracias y Violencia, Estudios de Antropología Jurídica*, ed. Sofia Tiscornia. (Buenos Aires: Editorial Antropofagia, 2004), 203-41; Maria Josefina Martinez, "Viaje a los territorios de las burocracias judiciales. Cosmovisiones jerárquicas y apropiación de los espacios tribunales," in *Derechos humanos, tribunales y policías en Argentina y Brasil. Estudios de Antropología Jurídica*, ed. Sofia Tiscornia and Maria Victoria Pita (Buenos Aires: Editorial Antropofagia, 2005), 167-183.

<sup>266</sup> Sarabayrouse Oliveira, "La Justicia Penal y los universos coexistentes"

<sup>267</sup> Roberto Da Matta, *Carnavais, Malandros e Heróis* (Rio de Janeiro: Ed. Zahar, 1980) cited in Sarabayrouse Oliveira, "La Justicia Penal y los universos coexistentes," 204.

<sup>268</sup> Sarabayrouse Oliveira, "La Justicia Penal y los universos coexistentes," 211

<sup>269</sup> Marie-André Jacob, "The Shared History: Unknotting Fictive Kinship and Legal Process," *Law and Society Review* 43 (forthcoming 2009).

<sup>270</sup> Sarabayrouse Oliveira, "La Justicia Penal y los universos coexistentes," 212.

encompassing analytical category poses a risk for the analysis itself: while trying to make kinship visible—either rooted in biology; or made up by social practices; or yet, as a symbol embodied in the “judicial family” metaphor—the analysis takes kinship for granted. Consequently, kinship, more than an “influence” on (or the “other face” of) modern judicial reason, as previously defined, actually becomes the logic that drives the institution’s workings. In this respect, the local judiciary is cast as a distorted image of what a judicial system *should* be; and kinship becomes one of the analytical variables through which the local is scrutinized. The comparison, therefore, presents kinship as “a deviation of proper bureaucratic practices”;<sup>271</sup> in other words, the gap between modern bureaucracy and the form in which it is locally practiced.

### ***Roles***

The aforementioned separation between *vocalías* and *secretarías* that I first encountered through a detailed look at the judicial directory, and later apprehended through my subjects’ accounts, actually elicits a division of labor inside the Court that pivots on clerks’ views of their work in terms of creativity, instrumentality and agency. Notably, this division of labor is enacted in relation to the clerical movement of files within the judicial institution. For the most part, Supreme Court’s dossiers are created upon the texts of appeals to lower courts’ judicial decisions or upon lawsuits that are filed before the Court directly. Moreover, dossiers are made up of every bureaucratic matter involving the Court’s daily operation, such as staff issues, payroll, internal procedure and organization; budget administration and management.<sup>272</sup> Leaving aside the empirical question of whether a file entertains a *bureaucratic* affair or a *judicial* affair, files are ultimately circulated to the Justices for their opinion. Yet, in most of the cases, and depending on the type of appeal in question, they are first

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<sup>271</sup> Annelise Riles, “Real Time: Unwinding technocratic and anthropological knowledge,” *American Ethnologist* 31: 3 (2004) 392-405.

<sup>272</sup> See Chapter Two of this dissertation.

reviewed by a *secretaría* determined by the particular branch of law the case deals with. As an example, appeals involving lawsuits filed by bank depositors against the “freezing” of their savings in U.S. dollars during the 2001/2002 economic crisis are sent to the *secretaría* or desk that deals with Tax, Customs and Banking issues for a legal opinion before their circulation among the Justices. My dossier, given that the subject matter was framed as an “administrative” affair at the outset, was sent directly to the Court General Administration for review, and later forwarded to the Justices for their opinions.

In this scheme, *vocalías* (the Justices’ offices) are consistently depicted as the venue in which creativity “happens” or “flows,” while judicial *secretarías* or judicial desks are the “instruments” through which Justices know the Court’s previous rulings on similar cases. As a *secretaría* clerk explained to me: “the role of the *secretaría* is just technical; hence, the duty of the *secretaría*’s staff is to offer the Justices all the current available possibilities to help them reach a decision on the new case.” Yet, the opposition between creativity (*vocalías*) and instrumentality (*secretarías*) that clerks pointed out to me, evokes a very powerful image of *secretarías* as the “guardians” of the Court’s precedents and of the *secretarías*’ chairs (Court clerks) as “simple executors” (*meros ejecutores*) who manage the circulation of files and assist the Justices in this proceeding.<sup>273</sup> “You know, a Court clerk is an assistant; who gives the orders is someone else [the judge],”<sup>274</sup> a Justice’s clerk argued, recalling in this way, the existing “gap” between judges and clerks, pointed out by the judge and ex-clerk’s account discussed above.

In contrast to this, the data shows that those who work for the justices do not themselves seem bound by the Court’s precedents as the *secretaría*’s staff attorneys

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<sup>273</sup> Fieldnotes, October 4, 2006.

<sup>274</sup> Ibid.

do. Indeed, at the *vocalías*, “you can *choose*,” as one Justice’s clerk argued, furthering this idea of creativity, which she experienced as the possibility to make “new” law, leaving aside the precedents.<sup>275</sup> In a similar sense, another Justice’s clerk stated: “you can *create* the decision with the *Ministro* (Justice).”<sup>276</sup> Yet, in the course of an interview, a law clerk explained to me how she had to change her discursive practices according to the clerical post she held at the Court—first she had been assigned to clerk for the “Court” in a *secretaría*; and later, she clerked just for a Justice, in a *vocalía*. “In the first case, I had to address my legal opinions to the entire Court, to all Justices...I wrote my opinions to the Court as an *institution*...; whereas in the second case, I drafted the opinions only for my *Ministro* ... I had to write as if I were him ... I wrote only for myself [the Justice].”<sup>277</sup>

Nonetheless, as I observed, the scheme of creativity *versus* instrumentality on which my subjects draw is not as rigid as the clerks’ portrayal would lead one to believe. On the contrary, it leaves room for both subtle and meaningful variations on the roles my subjects depict, in particular, those played by the clerks in the *secretarías*. For instance, a clerk of a *secretaría*, whose account drew heavily on the idea of *secretarías* as only technical bodies, told me that despite the fact she did not work for any particular Justice, she had been “called” (consulted) directly by the Justices on several occasions due to her expertise in a very specific sub-field of law (“very technical, with no political implications”).<sup>278</sup> I return to this particular point further below. Along the same lines, the chair of one of the *secretarías* mentioned that his supervision of the circulation of the file was hardly a bureaucratic proceeding; in some instances his intervention became a significant tool for reaching a majority

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<sup>275</sup> Interview, March 3, 2006.

<sup>276</sup> Interview, June 22, 2006.

<sup>277</sup> Interview, October 25, 2005.

<sup>278</sup> Interview, August 18, 2006.



opinion, he said to me very proudly. Equally proud of his work, a clerk from a *secretaría* told me about an opinion he had just drafted in a case (involving a fundamental right issue, as he made it clear) in this way:

Clerk: I drafted that opinion based on my philosophical beliefs. I strongly draw on natural law, and the rationale of the opinion cites natural law arguments. I could not have done it, but I did it.

Leticia: So, why did you do it?

Clerk: Because I have to be congruent with myself; because the Court has drawn previously on natural law, and also there is a large tradition that precedes my pre-comprehension. I cannot put my personal beliefs only because I want to do it. I back my opinions on thousands of authors and on the Court's case law with similar arguments.<sup>279</sup>

As the above accounts suggests, the binary *vocalías* and *secretarías* works on a discourse that both furthers and denies the autonomy of human agents. At *vocalías*, agency is acknowledged by the (law clerks') possibility to leave aside precedents, and to "create" the law. Agency and creativity, therefore, appear as identical features, and, implicit in this association is the assumption that agency—like creativity—is linked to will or intention.<sup>280</sup> Now, turning to the *secretarías*, my subjects' discourses elaborate on a form of agency that rejects the autonomy of human agents by stressing the technical and instrumental role of the *secretaría*'s staff attorneys, who come to value

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<sup>279</sup> Interview, September 4, 2006.

<sup>280</sup> Marilyn Strathern, *Property, Substance and Effect*, 17; James Leach, "Modes of Creativity," in *Transactions and Creations: Property Debates and the Stimulus of Melanesia*, ed. Erich Hirsch and Marilyn Strathern. (New York, Oxford: Berghahn Books, 2004), 152.

the constraints of their agency in the service of “papering” things or being the voice of the Court’s precedents.

Further, in the context of the practices that I observed within the Court, the displacement of agency that operates in the *secretarías* draws attention to their clerks’ commitment to conform their workings to an ideal model of adjudication. Here, judicial bureaucrats are seen as operators of a machine; or “operators of the law,”<sup>281</sup> as they are commonly referred to in the literature of the civil law tradition. In this sense, the constraint of agency that emerges in the clerks’ view of their work might constitute a rhetorical tool for the maintenance of bureaucracy’s rationality, since it ultimately works to cast these subjects’ workings on a rational and objective basis. In other words, “they [Court bureaucrats] present a version of themselves as they would like to be seen,” to borrow Strathern’s terms.<sup>282</sup> An anecdote told by a *secretaría* staff attorney shows how this modality of agency is deeply embedded in judicial bureaucrats’ consciousness and social practices:<sup>283</sup> a draft containing a legal opinion on a case was sent back to the *secretaría* that had drafted it because it conveyed the opinion of the chair of the *secretaría* rather than that of the Court.<sup>284</sup>

Yet, one could find analogies between this modality of agency in which these clerks see themselves as “instruments” and “mediators” and what Miyazaki has termed in his study of a community of religious practitioners in Fiji, the “abeyance of agency.”<sup>285</sup> According to Miyazaki, one way to understand agency abeyance is to view

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<sup>281</sup> John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, second edition (Stanford, CA: Stanford University Press, 1985).

<sup>282</sup> Strathern, *Property, Substance and Effect*, 19.

<sup>283</sup> Sally Engle Merry and Donald Brenneis, “Introduction,” in *Law & Empire in the Pacific, Fiji and Hawai‘i*, ed. Sally Engle Merry and Donald Brenneis (Santa Fe, NM: School of American Research Press, 2004), 3-34.

<sup>284</sup> Interview, November 2, 2006.

<sup>285</sup> “What makes religious rituals consequential is not the intentions of experientially inaccessible entities from religious practitioners’ viewpoint but the limits placed, at least temporarily, on their own capacity to make sense of events or even their capacity to act.” Hirokazu Miyazaki, “Faith and its Fulfillment: Agency, Exchange, and the Fijian Aesthetics of Completion,” *American Ethnologist* 27:1 (2000):31-51, 32.

it as the ultimate strategic act of rhetorical manipulation;<sup>286</sup> though he is far from endorsing the conceptualizations of the abeyance of agency as purely strategic—e.g. either as an excuse for human agency,<sup>287</sup> or as a tool for controlling risks.<sup>288</sup>

### *Subjects as Documents*

In the internal organization of the judicial bureaucracy, persons are easily identified by the positions they hold inside the institution. A careful reading of the large Supreme Court's Directory (*Guía Judicial*) was useful in this sense. People are listed in alphabetical order according to the functions they are assigned within the institution, which helped me outline a scheme of division of labor within the institution and orient my inquiry. My encounter with judicial bureaucrats worked largely on the basis that their names were referred to me by their colleagues or found in the judicial nomenclature due to the posts these people held and the functions they were said to perform in the judicial apparatus, for instance, clerks study the cases and draft legal opinions; judges decide upon these drafts.

Underlying this view, furthered by the clerks' above descriptions about their workings in the Court, is the notion that persons and things are interchangeable; that is to say, the subjects of decision-making practices are apprehended through the texts and documents they create; in other words, persons are "objectified" by the things they produce.<sup>289</sup> From this perspective, the subjects of judicial practices are narrated, described, and understood through their interventions in the judicial process, which, as I mentioned in the previous section, take place within the contours of the dossier.

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<sup>286</sup> Ibid., 42.

<sup>287</sup> Michael Herzfeld, *Cultural Intimacy: Social Poetics in the Nation-state*. New York and London: Routledge, 1997). Cited in: Hirokazu Miyazaki, "Faith and its Fulfillment: Agency, Exchange, and the Fijian Aesthetics of Completion," *American Ethnologist* 27: 1 (2000):43.

<sup>288</sup> Webb Keane, "The Value of Words and the Meaning of Things in Eastern Indonesian Exchange," *Man* (n.s.) 29:3 (1994):605-629. Cited in: Hirokazu Miyazaki, "Faith and its Fulfillment: Agency, exchange, and the Fijian Aesthetics of Completion," 43.

<sup>289</sup> Strathern, *The Gender of the Gift*.

Consequently, creativity and instrumentality are categories which might work for either persons or their labor, in the understanding that persons can be identified by the documents they make. This point is illustrated by Alain Pottage (building his argument on Marilyn Strathern's ethnographic analogy): "Things [in a commodity economy] are cast as independent forces in the world, and the agency of persons is distinguished or disclosed by their interventions in, or modifications of these forces. The agency of persons is therefore understood in terms of an idiom of labor, or productivity, so that personal relations are reified in the composition of things."<sup>290</sup>

In Marilyn Strathern's view, objectification is understood as "the manner in which persons and things are construed as having value, that is, are objects of people's subjective regard or of their creation."<sup>291</sup> Moreover, in Strathern's account, objectification becomes a basis of comparison between two economies—Euro-American commodity economy, on the one hand; and Melanesia gift economy, on the other—with the assumption that this artifact enables simultaneous perceptions of similar and different process in each.<sup>292</sup> As Pottage explains, Strathern's ambition is to enact an analogical counterpart to the cultural domain of Euro-America, a perspective from which the presuppositions and contexts of that domain can be made visible.<sup>293</sup>

If we take symbols as the mechanisms through which people make the world known (objectify it), these mechanisms themselves may or may not be an explicit source of their knowledge practices. The commodity logic of Westerners leads them to search for knowledge about things (and persons as things); the gift logic of

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<sup>290</sup> Pottage "Persons and Things: an Ethnographic Analogy", *Economy and Society* 30:1 (2001):112-138, 114.

<sup>291</sup> Strathern, *The Gender of the Gift*, 176.

<sup>292</sup> Ibid.

<sup>293</sup> Pottage, "Persons and Things: an Ethnographic Analogy."

Melanesians to make known to themselves persons (and things as persons). For the one makes an explicit practice out of apprehending the nature or character (convention) of objects, the other their capabilities or animate powers (invention). If I call these practices reification and personification then, in the first case people are making objects appear as things, in the second as persons.<sup>294</sup>

### ***Role Players***

Strathern's description about these two modes of objectification, of persons and things in commodity and gift exchange economies, helps elaborate on the different perspectives from which the subjects of bureaucratic practices become apparent and cognizable. Accordingly, as I indicated above, the subjects of Court documentary practices are mostly regarded through their interventions in the files. Personhood, therefore, is grasped in the practice of "papering," that is, in the practice of creating the judicial dossier. However, from another point of view, this commonsensical routine of circulation of files may also render the subjects of Court documentary practices visible, not just as objects or things, but as relations and persons. In other words, if persons can be grasped through the forms of the things they produce, as previously described, they also may be revealed as persons, that is, "as positions from which people perceive one another."<sup>295</sup> Here, I have in mind the relations of knowledge that the circulation of files discloses, though in a mode in which they remain concealed from view.<sup>296</sup> From the vantage of these relations, the subjects of the legal bureaucracy can be seen in their quality of relations/persons.

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<sup>294</sup> Strathern, *The Gender of the Gift*, 176-7.

<sup>295</sup> Strathern, *Property, Substance and Effect*, 15.

<sup>296</sup> See Chapter Four of this dissertation.

Under the gift exchange logic, Strathern argues, specific relations are created “through the separation of persons from one another”; and, it is through relations that persons are defined in respect of one another;<sup>297</sup> but “relations are personified in the separation of persons to the extent that persons (continue to) (thereby) have an effect on one another.”<sup>298</sup> Gifts, she explains, reify or objectify the capacities and powers contained in persons/relations. Relations are “endowed with effect, in anticipation of—or in commemoration of—being activated,” although the effectiveness of relations “depends on the form in which certain objects appear.”<sup>299</sup> I do not seek to compare Court dossiers with Hageners’ wealth items; nor the circulation of files with gift exchange rituals. However, in one sense this analogy may work: it indicates a similar aesthetic effect. Accordingly, the dossier, like the transacted resource in the gift, holds out the possibility to elicit and actualize personal capacities.

As I explained in the previous chapter, regardless of how files are initiated,<sup>300</sup> the practices of the various figures involved in document-making seem to converge in one particular action: the practice of file circulation (*circulación del expediente*). The circulation of the dossiers is manifested in different dimensions: materially, in the quotidian passage of carts saturated with files that are pulled by the Court’s staff along the corridors of the *Palacio de Tribunales* (the Palace of Tribunals, home of the Supreme Court)—an aesthetically powerful ritual; and virtually, in the check of electronic records. Both rituals lend regularity to the file circulation practice,

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<sup>297</sup> A useful way of thinking about Strathern’s argument is through the relationship between donor and recipient, which she takes here as paradigmatic: “it is in each distinguishing himself from his partner—in order to undertake the transaction—that the relationship between them becomes visible. Each acts with the other in mind.” Strathern, *Property, Substance and Effect*, 16.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid.

<sup>300</sup> As I explained above, Supreme Court’s dossiers are generally created upon the texts of appeals to lower courts’ judicial decisions or upon lawsuits that are filed before the Court directly. Additionally, dossiers are made up of every bureaucratic matter, like my request to conduct research in the Court. See Chapter One of this dissertation.

quintessential to any bureaucratic organization, making both the institution's documents and subjects knowable.

In addition to this, I also explained that the material circulation of files within the institution produces an effervescence of textuality that manifests into resolutions, legal opinions, memoranda, reports, conclusions; documents are attached—as different layers—to the dossier. This clerical movement of files can be tracked through the check of the Court's electronic records,<sup>301</sup> which makes possible, as in my own case, to follow up the status of dossiers. However, in the process of tracking down one's file, one is presented with a version of the file in which all *but* its ends—or the file's top (an appeal or a lawsuit) and bottom (a decision or the final ruling in the case) layers—remain concealed from view. In other words, the whole argumentative sphere is missing. I am not interested here in uncovering the conceptual structure of Court's judgments that the apparent “bifurcation” of its discursive practices may articulate,<sup>302</sup> nor in the “meaning” and the “politics” underlying these documents.<sup>303</sup> I examine extensively these aspects in the next chapter.<sup>304</sup> Rather, by pointing to the documents that bureaucratic practices veil, I elaborate on the mode in which documents make persons and relations visible within the contours of the judicial apparatus. From this perspective, the composite of arguments, opinions, conclusions, and even the recount of facts usually assembled in the memorandum that accompanies the legal opinion (*proyecto de sentencia*) in a case, are relevant not so much as the foundation of a

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<sup>301</sup> A Court's bylaw enacted in 2003 establishes the publication of Court's dossiers. See: Supreme Court bylaw No. 35, December 11, 2003, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed July 15, 2007).

<sup>302</sup> For a discussion on this subject, see Mitchel de S.-O. -I.'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2005). See also Chapter Four of this dissertation.

<sup>303</sup> Annelise Riles, “[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis,” in *Documents: Artifacts of Modern Knowledge*, ed. Annelise Riles (Ann Arbor: University of Michigan Press, 2006) 71-92.

<sup>304</sup> See Chapter Four of this dissertation.

decision that may or may not be accessible to others, but as the forms in which persons unfold and are “constituted as persons in regard of others.”<sup>305</sup>

This insight was first suggested to me by the Court officer’s denial of access to the rationale of the decision on my dossier, on the basis that the documents containing such a rationale were only for internal circulation, from which I was excluded in my petitioner capacity.<sup>306</sup> Later, this idea about the subjects of the judicial bureaucracy becoming apparent not in the form of the documents they create, but as persons themselves, was even more palpable in these subjects’ own descriptions of the circulation of files. For instance, in one of the interviews that I conducted with law clerks, one of them (a Justice’s clerk) stated that the memorandum enclosed in the file was something “written to us,”<sup>307</sup> meaning by “us” the people who study the case and write legal opinions. She explained further: “the case must be studied, and the memo reflects such study; it is to persuade the other, the people who will read the file.” Indeed, the *memo* is perceived as the venue that makes discussion possible, since arguments and counter-arguments are deployed and exhausted beyond the external scrutiny.<sup>308</sup> But more importantly, as I describe below, it is in this commonsensical bureaucratic practice of writing, amending, and discarding memoranda through which the subjects that create these documents are elicited.

In the *secretarías*, memoranda are generally initialed, a practice that not only enables identification through the physical presence of the author’s initials on the document,<sup>309</sup> but according to some of the law clerks also evidences the *secretaría* chair’s (Court clerk) deference to his staff lawyers’ professional skills. At one of the

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<sup>305</sup> Strathern, *The Gender of the Gift*, 275.

<sup>306</sup> See Chapter Four.

<sup>307</sup> Interview, June 20, 2006.

<sup>308</sup> Interviews, October 21, 2005; February 14, 2006; October 30, 2006.

<sup>309</sup> See: Mario Biagioli. “Documents of Documents: Scientists’ Names and Scientific Claims,” in *Documents: Artifacts of Modern Knowledge*, ed. Annelise Riles (Ann Arbor: University of Michigan Press, 2006), 127-157.



*secretaría*, a law clerk who had held previously a clerical post at a Justice's office confessed to me that her newly adopted practice of initialling her memoranda actually helped her overcome the feeling of being pulled back by her relocation from a *vocalía* to a *secretaría*. "Initially, I felt like a sort of political devaluation (*devaluación política*);" and she explained to me that clerking for a Justice implied some managerial advantages for her: "if you need something it is most likely that you get it faster if you work for a Justice than in any other place in the Court."<sup>310</sup> However, she told me that she had realized that to work in a *secretaría* was good "because you are not an anonymous person anymore."<sup>311</sup> She recounted that as a Justice's clerk she used to work in a team and that her drafting of legal opinions for the Justice was a collective rather than an isolated effort. In contrast to this, "in a *secretaría*, you have to sign in (to write your initials on) your work for it to be identified and criticized by others."<sup>312</sup> In her view, this act of identification made herself gain her colleagues' "recognition" and "respect" as an expert in her field of law; "they even praised my writing," she proudly confided to me.<sup>313</sup>

In this context, the name of the author of the legal document (the clerk) may unfold the same "indicative" and "descriptive" functions as proper names.<sup>314</sup>

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<sup>310</sup> Interview, February 14, 2006.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> Biagioli recalls Foucault's insight on the functions of the author's name, as described in reference to proper names' own functions. Building upon Foucault's association between the proper name and the author's name, I extend it to a memorandum in light of the observed effects of these documents. As Biagioli recounts, Foucault finds proper names both indicative and descriptive; though they "can also function as a label that does not refer to any specific person and yet constitutes a certain body of texts as a unified whole," Mario Biagioli, "Documents of Documents: Scientists' Names and Scientific Claims," 138. In Foucault's view, Biagioli notes, these multiple functions of the author's name reflect different operational logics in regimes of fields and disciplines. Nonetheless, in contrast to Foucault's empirical assertion that the scientific method "had supplanted the name of the author as the entity demarcating scientific texts from other kinds of works," Biagioli argues that "the name of the scientist has always remained crucial...the author's name may have become 'banal' in modern science, but its role is more crucial than ever." Biagioli, "Documents of Documents: Scientists' Names and Scientific Claims," 140.

Nonetheless, that the clerks' names are actually stamped on the documents that they make becomes incidental to the "individuating" effect of these documents in their bureaucratic circuit within the Court. As a few clerks mentioned to me, they were able to identify who wrote the memoranda on the cases of their specialty (e.g. public law, banking) even where the writer's identity is not disclosed. "There are many people here, in the Court, but *we know* each other,"<sup>315</sup> was one clerk's explanation for her ability to identify the authors of anonymous memoranda and legal opinions that come for her review. In other words, regardless of the author's name on a given document, the bureaucratic knowledge acquired through the routinization and specialization of tasks in long term office<sup>316</sup> supplies the basis for identification and recognition. In this context, authorship, if claimed by the subjects that create these documents, does not entail an exercise of ownership of individual labor or of a particular piece of work. Rather, it becomes a mode of making personal capacities visible and recognizable among peers. A law clerk summarized this recognition's effect in terms of trust and confidence. As she told me, the fact that she knew who wrote a memo in a case that came for her review would influence her level of confidence about the legal analysis and solution that person proposed in the document. "I know the person," she said to me, "I know how she works, how she thinks, and how serious and reliable her work can be...If I trust her, it is most likely that I will agree with her legal opinion about the issues discussed in the case; but if I do not share her opinion, I am sure that she reached such a conclusion because she saw things that probably I have overlooked at first sight."<sup>317</sup>

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<sup>315</sup> Interview, June 22, 2006.

<sup>316</sup> Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986).

<sup>317</sup> Informal conversation, April 18, 2008.

### *Putting the pieces together*

At this point, I would like to return to the description that one of my subjects, a law clerk, made of her work at one of the Court's *secretarías*. As she explained to me, her role in the Court consisted of giving expert advice on a very specific and technical sub-field of law, "with no political implications." She provided this emphasis to make it clear that she would keep herself apart from any "external" influence (whatever it is) that, in her view, might compromise her judgment. For instance, she would not meet the counsels or the parties of a case to hear informally their arguments, an ordinary practice in the Argentine Court: "I don't need them [the parties' arguments] to reach my opinion in a case...I read every file page; I read everything that is written [in the file]; and what is not, that will not make me change my mind."<sup>318</sup> Likewise, if she had to choose between her clerical post at the *secretaría* and a clerical position for a Justice in particular, she would decide to maintain her current position, as it would be difficult for her to keep her legal expertise if she worked at a *vocalía*: "Justices' clerks have to be more versatile," she asserted.<sup>319</sup> In this clerk's view, clerks' meetings with the parties, or even her potential abandoning of her field of specialization are perceived as "a failure of knowledge"<sup>320</sup>—a failure of her own knowledge and unique role as a legal "technician"—as these circumstances represent a "deviation from proper bureaucratic practices,"<sup>321</sup> that is to say, from rational and objective adjudication.

While describing her professional tasks, this clerk insisted on the idea that she gave only technical legal advice, that she drafted technical legal opinions and that she discussed only technical issues in the memoranda she wrote for the Court; she even

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<sup>318</sup> Interview, August 18, 2006.

<sup>319</sup> Ibid.

<sup>320</sup> Riles, "Real Time: Unwinding technocratic and anthropological knowledge," 396.

<sup>321</sup> Ibid.

saw herself as a technician.<sup>322</sup> Consequently, the clerk gives an account of herself through her interventions in the process of judicial lawmaking: the documents she produces. From this perspective, these documents are the means through which the clerk's knowledge is unfolded and apprehended. In other words, she becomes knowable in terms of her labor or productivity within the legal bureaucracy.

Nonetheless, as I described above, another way in which the subjects of this regime of documentary practices are made apparent is not in the form of the documents (things) they create, but as persons themselves. Files stage a relation between the participants of these documentary practices through which their personal capacities are elicited and actualized. From this point of view, which the practice of adjudication keeps concealed from view, each participant is differentiated as a particular person and apprehended in her or his specific capacities. Seen from this perspective, the anecdote told by the same clerk about the Justices' call for her expert advice, also noted earlier, becomes even more meaningful, as illustrative of my argument: "They [the Justices] have listened to me, they had confidence in me," she affirmed while recalling that episode<sup>323</sup> This effect of individuation<sup>324</sup> that the clerk's account points out takes places throughout the circuit that files complete within the Court. To put it in different words, the circulation of files, imagined as a sort of ceremonial exchange, supplies, "the context or vehicle for this constitutive display of [personal] capacities."<sup>325</sup> However, as I have demonstrated, persons are not immediately available; they are accessible depending on the forms in which they appear<sup>326</sup> throughout the institution's documentary practices.

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<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> See: Strathern, *The Gender of the Gift*.

<sup>325</sup> Pottage, "Persons and Things: an Ethnographic Analogy," 114.

<sup>326</sup> Ibid. See, also: Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things*.

## CHAPTER 4

### FILLING IN THE GAPS

The organization of the Argentine system of government, and of the judiciary in particular, was inspired by the United States Constitution;<sup>327</sup> and even the judicial review doctrine that grants courts the authority to declare the unconstitutionality of laws has been acknowledged in the Argentine Court's jurisprudence as "implicit" in the text of the Constitution, mimicking the development and tradition of judicial review in the United States.<sup>328</sup>

Drawing comparisons between the two systems—not to mention the workings of the Supreme Courts of these two jurisdictions—appears to be a temptation that both scholars<sup>329</sup> and even judicial bureaucrats in my field cannot resist.

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<sup>327</sup> See: Argentina's Constitution, Second Part (Authorities of the Nation), Title 1 (Federal Government), First Division (on the Legislative Power), Second Division (on the Executive Power) and Third Division (On the Judicial Power). In particular, Section 108 of the Constitution (on the organization of the national judiciary) establishes that the Nation's Judicial Power "shall be vested in a Supreme Court and in such lower courts as Congress may constitute in the territory of the Nation," Argentina's Constitution, Second Part, Title I, Third Division (The Judicial Power) Section 108. Sections 116 and 177 establish the issues that fall under the jurisdiction of federal tribunals, including the Supreme Court.

<sup>328</sup> Despite the fact that the Constitutional text does not grant the judiciary the authority to make a final judgment on the constitutionality of laws, this power has been acknowledged through the Argentine Supreme Court's jurisprudence as "implicit" in the text of the Constitution; thus imitating the development and tradition of judicial review in the United States introduced by Justice Marshall's opinion in *Marbury v. Madison* 1 Cranch 137, 5 U.S. 137, 1803 WL 893 (U.S. Dist. Col.), 2 L.Ed. 60. The Argentine Court received the doctrine of judicial review in "Sojo," C.S.J.N. 32 Fallos 120, 136 (1887) although the circumstances surrounding this case had nothing in common with those of *Marbury v. Madison*. See Carlos Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press 1996), 3; Jorge Reinaldo A. Vanossi, *Teoría Constitucional II: Supremacía y Control de constitucionalidad*, 110-113 (Ediciones Depalma Buenos Aires, 1976). See, also, Alejandro Carrió, *La Corte Suprema y su independencia* (Buenos Aires: Abeledo-Perrot, 1996). Nonetheless, for Miller, it was the composite resulting from the decisions held in the trilogy "Sojo", "La Torre", C.S.J.N., 19 Fallos 231 (1877) and "Acevedo", C.S.J.N. 28 Fallos 406 (1885) which accounted for the Argentine Supreme Court's practice of following U.S. Supreme Court's precedents as source of authority (or even of legitimacy). This influence, notes Miller, began to decline in the late 1890s. See Jonathan Miller, "The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in the Nineteenth Century Argentina and the Argentina's Elite's Leap of Faith," *American University Law Review* 46 (1997): 1483-1572, 1542-1566.

<sup>329</sup> See, e.g.: Alberto B. Bianchi, *Jurisdicción y procedimientos en la Corte Suprema de los Estados Unidos. Análisis de los mecanismos procesales que hoy emplea la Corte argentina* (Buenos Aires:

What is more, being that the U.S. Court's workings are the source of inspiration for the Argentine judicial system, they have become, in many senses, the ideal against which the workings of the Argentine tribunal are checked. Accordingly, the role, status, and number of clerks in the U.S. Court, the tribunal's exercise of the *writ of certiorari* and the control it exercises upon its docket, the practice of delivery of oral arguments before the bench, the *amicus curiae* mechanism, and, to a lesser extent, the *stare decisis* doctrine followed by U.S. courts in general, are usually the features that prompt a comparison between the two institutions.<sup>330</sup> Notably, in this comparative

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Editorial Abaco de Rodolfo Desalma, 1993); Genaro Carrió, "Don Quijote en el Palacio de Justicia (La Corte Suprema y sus problemas)," *La Ley*, T 1989-E Sec. Doctrina, 1131-49; Carlos S. Fayt, *La Corte Suprema y la Evolución de su jurisprudencia. Leading Cases y Holdings. Casos Trascendentes* (Buenos Aires: La Ley, 2004); Jonathan Miller "Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina," *Hastings International and Comparative Law Journal* 21 (1997): 77-176; Augusto M. Morello, *La Corte Suprema en el Sistema Político* (Buenos Aires: LexisNexis, Abeledo-Perrot, 2005); Eduardo Oteiza, *La Corte Suprema: Entre la justicia sin política y la política sin Justicia* (La Plata: Editora Platense S.R.L. 1994); Héctor E. Sabelli, "Como trabaja la Corte," *Jurisprudencia Argentina Suplemento* (I): 3-11 (2007); Julio Oyhanarte, "Historia del Poder Judicial," *Todo es Historia* (61): 86-121 (1972).

<sup>330</sup> One of the most obvious points of comparison of the workings of these two tribunals is the number of cases that the Argentine Court decides annually *vis-à-vis* those that the U.S. Court entertains during the same period. In this respect, scholars usually emphasize the Argentine Court's case backlog against the about 80 or 90 full decisions that the U.S. Court delivers per term. See: reports *Una Corte para la Democracia, Asociación por los Derechos Civiles, La Corte y los Derechos. Un informe sobre el contexto y el impacto de sus decisiones durante el período 2003-2004* (Buenos Aires: Siglo XXI Editores, 2005), 38-9. Indeed, as institutional information about the U.S. Court's caseload indicates, plenary review with oral arguments by attorneys is granted in about 100 cases per term; formal written opinions are delivered in 80 to 90 cases; and approximately 50 to 60 additional cases are disposed of without granting plenary review. See: Supreme Court of the United States, "The Justices' Caseload," <http://www.supremecourtus.gov/about/justicecaseload.pdf> (accessed: August 12, 2008).

On the Argentine Court's caseload, for instance Helmke (citing both private and public statistics) argues that "between 1974 and 1984 the average number of cases decided annually by the Argentine Supreme Court was between 4,000 and 5,000. Between 1984 and 1994, that figure rose slightly to an average of approximately 6,000. But since 1997 it has skyrocketed to over 36,000." See: Gretchen Helmke, *Courts under Constraints. Judges, Generals, and Presidents in Argentina* (Cambridge: Cambridge University Press, 2005), 177 (citing FORES (Foro de Estudios sobre la Administración de Justicia), *Diagnóstico de la Justicia Argentina* (Buenos Aires: 1998); N. Guillermo Molinelli, M. Valeria Palanza and Gisela Sin, *Congreso, presidencia y justicia en Argentina. Materiales para su estudio* (Buenos Aires: CEDI-Fundación Gobierno y Sociedad, 1999) 710-13).

In the last years, the number of cases decided by the Court per term totaled 10,393 in 2005, and 9,499 in 2006, respectively. These figures, however, exclude the number of cases that retirees filed in the Court following Law 24463 section 19 (1995) that established that decisions of the National Social Security court of appeals had to be appealed directly to the Supreme Court. In 2005, the cases involving retirement issues decided by the Court totaled 11,010 whereas in 2006 they dropped to 3,435. This might be explained by Congress' passing of Law 26025 in 2005, which abrogated the former provision.

schema, the U.S. Court's practices are assimilated to the Argentine legal regime—the one embedded in the Federal Constitution, which, however has not yet in practice lived up to its theoretical promises. This argument becomes apparent in the words of a civil rights activist and executive director of an NGO: “we are not importing foreign [U.S.] legal systems and ideas; all our proposals are in the [Argentine] Constitution,”<sup>331</sup> he indicated. Therefore, as the statement suggests, the Constitution compels the Court with an “ought to be” that current legal practices fail to achieve.

In my opinion, this comparative instance, as observed in the local legal academia, works, in fact, to point out the now canonical distinction between “law in the books” and “law in action.”<sup>332</sup> In other words, these kinds of comparisons prompt to diagnose the existing gap between the legal norm (and hence the U.S. Court's legal practices to which it is assimilated), and its realization in local legal practices.

Also importantly, as I will show later, in accounting for this gap, the comparative effort draws either on a notion of law as a set of practices and institutions that can be transferred from one jurisdiction to another<sup>333</sup> or on a notion of law as the

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See: Poder Judicial de la Nación, Oficina de Estadísticas, [http://www.pjn.gov.ar/99\\_varios/estadisticas/Trabajos\\_Especiales/Fallos/indicefallos.htm](http://www.pjn.gov.ar/99_varios/estadisticas/Trabajos_Especiales/Fallos/indicefallos.htm) (accessed August 12, 2008).

<sup>331</sup> Interview, November 2, 2006.

<sup>332</sup> See, e.g.: Susan S. Silbey, “After Legal Consciousness” *Annual Review of Law and Society* 1:323-6 (2005).

<sup>333</sup> This notion is represented by the metaphor of the legal transplant—“the moving of a rule or a system of law from one country to another, or from one people to another”—as enunciated by Alan Watson to name the generalized phenomenon of legal borrowing, which, in his account, unfolds one of the law's many paradoxes: on the one hand, law may be regarded as a people's identity, it reflects the mystical unity of nation, culture, language and society as in Savigny's *Volkgeist*; on the other hand, he argues that “it is an accepted fact that most of the private law of all the modern legal systems of the Western world (and also of some non-Western countries), apart from the Scandinavian, derives more or less directly from Roman Civil Law or English Common law.” Alan Watson, *Introduction to Legal Transplants* (Athens and London: The University of Georgia Press, 1993), 21-22.

Annelise Riles notes that in Watson's account of the circulation of legal knowledge, practices and institutions among different jurisdictions lies the idea of the relative autonomy of law from society, which, in turn, makes possible for legal reform to take place “independently of social forces.” This thesis, like that of Ewald, argues Riles, seems to build upon Weber's notion of the certain autonomy of formally rational law. Annelise Riles, “Comparative Law and Socio-Legal Studies,” in *The Oxford Handbook of Comparative Law*, Mathias Reinman and Reinhard Zimmerman (eds.) Oxford: Oxford University Press, 776-813, 795-6.

reflection of a unique socio-cultural order.<sup>334</sup> In either way, what is at the center of the discussion is “the inevitable loss of knowledge” in the gap between the two practices: the original and the transferred practice.

In this chapter, I participate partially in the comparative trend by examining a particular practice that I observed within the Argentine Supreme Court: the mode in which the Court exercises its power to decide what cases to review and what cases to discard. The mechanism, it is argued, borrows from the United States Supreme Court’s practice of *writ of certiorari*. However, I do not intend to draw a comparative analysis between how the practice of the *certiorari* is performed in these two jurisdictions. Nor to point out the gap between the original and the imported one—by definition the latter cannot be identical with the original one.<sup>335</sup> Rather, I propose to obviate what scholars and judicial bureaucrats point as “lost” in the “translation” of the practice of *certiorari*, that is, the gap between these two practices as they are performed in the American and Argentine settings, and to focus on the knowledge that this gap actually elicits. In so doing, I take up Tom Boellstorff’s insight about the possibility of “dubbing” as a mode that “forges meaning through the holding-together of the otherwise incompatible.”<sup>336</sup> Nothing is lost in dubbing, notes Boellstorff, because it is built around an absence<sup>337</sup>—in contrast to translation, which is always “haunted by its inevitable failure.” As he explains: “There is no asymptotic melancholia because there is no fantasy of eliminating the gap in service of perfected meaning. For dubbing, the gap is the meaning.”<sup>338</sup>

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<sup>334</sup> Riles also remarks the equally absolutist character of this notion of law as “a pure artifact of society.” Ibid, 795.

<sup>335</sup> Tom Boellstorff, “Crafty Knowledges,” *The Political and Legal Anthropology Review* 31:1 (2008), 96-101, 99.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Ibid.



As I will describe in this chapter, not only is the idea of this existing gap between different legal practices what triggers my present analysis. A gap of another kind, found in the Court's document-making practices, is actually this chapter's ethnographic milieu. Indeed, it was through my encounter of this gap that I could access ethnographically the particular Court's knowledge-making practice that I examine in this essay.

### ***Finding the Gap***

In one of the multiple visits I paid to the Court administrative office to follow up the status of my dossier, I was informed that a decision on the request had been reached; “there is a *providencia*”<sup>339</sup> (a decision), I was told. That visit took place in early June 2006, approximately seven months after the dossier was initiated. On that occasion, I was also told that the decision in question had been forwarded along with the corresponding *oficio*—an official communication letter—to the Cornell Law School petitioners: to my thesis supervisor and the Dean for Graduate Legal Studies who had signed the original introductory letters, which I had delivered to each of the then eight Supreme Court Justices in October 2005.<sup>340</sup> I mentioned to the member of the Court's staff on duty that I had not been informed about such a decision, to which he responded that it had happened due to the fact that formally I was not considered a petitioner in such a case—the file, however, was named after me and I had written down my contact information on the letters that I assumed gave birth to the dossier. Nonetheless, after making sure that I was indeed “an interested party” by verifying my identity, the Court officer agreed to give me a “non-official” copy of the decision. He came to the front desk where I was waiting with a bundle of papers, all of them

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<sup>339</sup> In the Argentine Procedural Law, *providencias* are minor decisions taken in the course of a judicial process (mainly on procedural matters) that order proceedings, for instance, hearings.

<sup>340</sup> See Chapter Two of this dissertation.

containing information on my case. He pulled out the sheet with the decision, which he handed to me. I quickly read the decision (Figure 9):

Buenos Aires, May 24, 2006

Dossier 3737/05

Let it be known to the petitioners that the Ministers [Justices], having been made aware of the presentation of pages 1/4, decided to not allow the requested access, without any prejudice against the possibility of carrying out *ordinary* research in the Central Library of the Court (italics added).

Signature: Nicolás Alfredo Reyes

Supreme Court

General Manager<sup>341</sup>

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<sup>341</sup> Decision taken on May 24, 2006 in the General Administration dossier 3737/05 (free translation from Spanish)

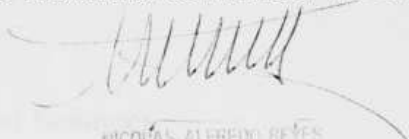


## *Corte Suprema de Justicia de la Nación*

Buenos Aires, 24 de mayo de 2006.-

**Expte. Nº 3.737/05.-**

Hágase saber a los peticionarios que habiendo tomado conocimiento los Señores Ministros de la presentación de fs. 1/4, decidieron no acceder a lo solicitado, sin perjuicio de la posibilidad de realizar una investigación normal en la Biblioteca Central del Tribunal.

  
NICOLÁS ALFREDO REYES  
ADMINISTRADOR GENERAL DE LA  
CORTE SUPREMA DE JUSTICIA  
DE LA NACION

**Figure 9. Decision in Dossier No. 3737/05**

I then asked the Court's employee if I could read the entire file, assuming that the rationale for that decision was in the pages I was not given to read. He said that the information I was asking for "belonged to the [Court's] internal circulation," which I could not access. I asked to see at least the rationale, but he replied that I could not read that either. Then, mobilizing my legal skills, I said that I would submit a written petition to the Court to access the dossier. The employee responded that I could certainly request to look at the dossier (*pedir vista del expediente*), though he anticipated that "they would not show me the *fundamentos* (rationale) of the decision."

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Consequently, on June 22, 2006, I submitted to Court General Administrator a formal request to access the content of the dossier, making explicit in my petition that I was also asking to read to the decision's rationale. Almost two months later, on August 17, 2006, the Administration issued an official communication letter, which was addressed to me on this occasion, informing of another *providencia* granting me access to the dossier. Nonetheless, once I had the dossier in my hands, I noticed that, in contrast to the thick piles of documents that I had seen in the clerks' offices and carried out in carts in the judicial premises, my dossier consisted only of eleven pages, four of which were the introductory letter (and its Spanish translation) addressed to the President of the Court (Chief Justice) signed by my thesis supervisor and the Cornell Assistant Dean for Graduate Legal Studies. The rest of the dossier contained the short text of the decision and the official communications addressed to my thesis supervisor and to the dean at Cornell Law School; my request to access the file; the decision which allowed me the access requested; and lastly, the notification through which the Administration office informed me that I was granted permission to read the file.<sup>343</sup>

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<sup>342</sup> Fieldnotes, June 2, 2006.

<sup>343</sup> Fieldnotes, August 22, 2008.

That moment, I must confess, was disruptive. On the one hand, as a claimant myself I seemed to have only part of the story: after an almost ten-month process, I was presented with a version of my dossier in which all *but* its ends—the top (the petition) and the bottom layers (the decisions)—remained concealed from public view. However, on the other hand, as an ethnographer, I was aware of the textual process through which opinions and judgments are shaped and annexed to dossiers along the circuit they complete within the Court. In other words, during my fieldwork in the Court I had encountered and observed a whole argumentative sphere which as a petitioner to the Court I was completely missing. Although the effect of being in such a situation was confusing, it was however effective in reinforcing my position as participant-observer:<sup>344</sup> the reaction that I was experiencing regarding the final decision on my request was much like any other claimant's reaction when she fails to get from the Court a positive response—though, I must confess, I was reacting more to the impossibility to find out the reasons for the denial than to the denial itself, as I was vaguely expecting that decision.

More importantly, as I examined the form and organization of the dossier I was given to read and the format of the final decision, I realized that I was also looking at the mode through which the tribunal dismisses or rejects the cases that are filed to it, a practice constantly referred to by my interlocutors at the Court in their descriptions of the tribunal's workings. This practice works to exclude from the Court's jurisdiction those matters that are deemed to interfere or obstruct the fulfillment of its authentic role. In other words, it helps the Court to keep itself apart from what Barbara Yngvesson has called the “garbage cases.”<sup>345</sup> This mode of operation, as I will

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<sup>344</sup> See Chapter Two of this dissertation.

<sup>345</sup> Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects. Order and Complaint in a New England Court* (New York, London: Routledge, 1998). I am thankful to Bill Maurer for this reference. Personal Communication, Association for Political and Legal Anthropology (APLA) Graduate Student Workshop: Law and Science and Technology Studies, December 1, 2007, Washington, D.C.).

describe further below, is essential to the Court's establishment/production of its authority.

### ***Gatekeeping and Exclusion***

In the Massachusetts court system that Yngvesson studies, garbage cases are those cases that involve citizen petty complaints, that is to say, "a broad range of conflicts in the family, the neighborhood, or the work place."<sup>346</sup> These cases are actually regarded as so insignificant by courts' officials that they are "out of place at the court" to the extent that even the trial court's *Standards of Judicial Practice* in Massachusetts urges clerks "to refrain from initiating criminal proceedings [in these petty cases] where the conflict can be fairly resolved by something else";<sup>347</sup> and yet, they are generally dismissed by clerks or withdrawn by the plaintiffs themselves during the initial stages of the process.<sup>348</sup> Dismissals, argues Yngvesson, constitute the court "as a place where 'garbage cases' are excluded so serious problems of order can be dealt with,"<sup>349</sup> even though these (garbage) cases amount to "as much of the court's work as the criminal charges by which its official business is measured...."<sup>350</sup> That is to say, what Yngvesson is pointing out is that exclusion not only protects courts from what are regarded as 'frivolous' matters, it also works to *shape* the courts' *authority* by allowing the court to classify certain cases as garbage cases and others as cases

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<sup>346</sup> For instance, "a shoving match in which somebody threw the first punch, kids pushing kids, or a lover's quarrel." Ibid., 18.

<sup>347</sup> Ibid.

<sup>348</sup> Yngvesson describes that in garbage cases dismissals or withdrawals generally take place "before, during, or after a show cause hearing." Ibid. Nonetheless, she explains that a clerk's dismissals of citizen complaints do not mean her disengagement. On the contrary, dismissal often involves monitoring techniques for the cases denied, for instance, "technical issuance," "continuing a case for a few months to see if there is any more trouble, and "holding a case at the show level." This altogether defines the clerk's role as "watchdog," both of the court and the community. Ibid., 19.

<sup>349</sup> Ibid.

<sup>350</sup> Ibid.

worthy of attention; and hence to exclude certain kinds of relationships, people, and knowledge.<sup>351</sup>

One way to interpret the exclusion of garbage cases from courts' jurisdiction is to take courts' gatekeeping practices at their face value; that is, as a mechanism that operates to protect courts from "frivolous matters" in order to keep the docket down or under control. However, as Yngvesson's insight suggests, exclusion and gatekeeping practices are actually constitutive of judicial authority. In the Massachusetts local court system that she studies, the clerk is positioned at the imaginary juncture of two domains, the public and the private, which she contributes to by reproducing and distinguishing "crime" (serious and public stuff, matter of law) from "garbage" (mundane and private, and out of court). Seen in this light, the ethos of the court would lay within the dynamic tension between what courts *can* do and what they *cannot* do.

The practice of gatekeeping, argues Yngvesson (building her argument on Michel de Certeau), becomes "*a way of using* imposed systems, a practice of the order constructed by others [that] redistributes its space," creating "a certain play in that order, a space for maneuvers" (italics in the original).<sup>352</sup> In her account, clerk's practices of naming crime and revealing rights, that is, of naming law and excluding garbage, is a form of tool through which the law can be made known. Specifically, she

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<sup>351</sup> Drawing an historical analysis of the emergence of lay justice in New England (even before the revolution), she describes how the creation of tribunals for petty claims actually helped institutionalize a hierarchy of judicial practice while consolidating a legal elite in the new American republic. In this respect, trivial cases were assigned to "inferior" courts, or to the "community function of such courts," whereas the prosecution and defense of "serious matters were assigned to 'superior' tribunals and 'rigorously professional experts.'" Ibid., 18. In another section of her work, Yngvesson points to a somewhat similar use of exclusion as constitutive of the judicial space and hierarchy: Bourdieu's description of the institution of the judicial space as the borderline between actors, between specialists and nonspecialists, in terms of their "view of the case." Accordingly, Bourdieu distinguishes "the vulgar vision" (that of the client or non expert) from "the professional vision," that of the judge or lawyer. Ibid., 143 note 5.

See also: Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38 (1987), 805-853, 828-9.

<sup>352</sup> Ibid., 30 (italics in the original).

finds in her fieldsite the hearings before the clerk as the space where law's power is limited and extended "through a clerk 'who connects, by separation, classes and discourses.'"<sup>353</sup> Yet, in Yngvesson's account, the clerk's capacity for maneuver depends in part on who the clerk is—different institutions enable clerks differently.

### ***Making the Court a proper place of Law***

In Yngvesson's study hearings before the clerk play a crucial role as a gatekeeping practice ("the clerk is like a watchdog").<sup>354</sup> In the Argentine Court, exclusion of garbage cases operates on more diffuse grounds; it unfolds in the exchanges and practices of legal officials that develop around the dossiers which circulate for review. In the previous chapter I presented the schema of labor division that I encountered in the Argentine Supreme Court based on the clerical posts that clerks formally hold within the judicial structure.<sup>355</sup> Clerks, therefore, can work either for a Supreme Court judge (at a judge's office or *vocalia*) or for one of the Court judicial secretaries or judicial desks (*secretarias judiciales*). Such a division of labor, I explained, pivots on clerks' views of their roles in terms of creativity, instrumentality and agency. As a result, *vocalias* are portrayed as the venue where clerks can help Justices "create" the law—in clerks' accounts, as the possibility of "making new law" by leaving aside the precedents<sup>356</sup>—*vis-à-vis* the view of clerks' roles as merely technical or instrumental in the *secretarias*, where clerks' papering practices are deemed the "voice" of the Court's precedents.<sup>357</sup> However, as I also explained, the binary creativity *versus* instrumentality through which the clerks' roles are indexed is not as fixed or static as my subjects' accounts would lead one to believe. Clerks' roles are enacted daily in relation with the clerical movement of dossiers within the judicial

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<sup>353</sup> Ibid.

<sup>354</sup> Yngvesson, *Virtuous Citizens, Disruptive Subjects*, 15.

<sup>355</sup> See Chapter Three of this dissertation.

<sup>356</sup> Ibid.

<sup>357</sup> Ibid.



institution, that is, through clerks' own documentary practices (e.g. their writing of memoranda, drafting of proposals for a judicial decision on a given case). Indeed, this commonsensical document-making practice creates room for both subtle and meaningful variations on the *a priori* creativity/instrumentality divide that clerks account for.<sup>358</sup> And yet, it is this practice that activates clerks' capacities to "name" the law (the cases that the Court should take) and to indicate what cases should be removed from the tribunal gaze. In other words, regardless of how clerks give account of themselves—whether as truly law-makers or mere law executors—or of the mode in which their roles are actually elicited in my fieldsite, I want to foreground judicial bureaucrats' everyday papering practices as acts of "naming" or of "instituting"—glossing Bourdieu and Yngvesson<sup>359</sup>—and, as such, as gatekeeping practices that work to keep the Court proper as a place of law by defining what is a matter of law (public and subject to judicial consideration) and what is banal ("garbage") and should be kept in the realm of the private.<sup>360</sup> Nonetheless, it is worth noting that a strong belief that the Court is a place dominated by problems that should be out of the Court persists among my subjects. I would like to recall here the Argentine Supreme Court Justice's metaphor of the "general store" criticizing the Court's becoming everything but a highly specialized tribunal,<sup>361</sup> or the clerk's complaint against the "cases that should not be here [in the Court]."<sup>362</sup>

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<sup>358</sup> Ibid.

<sup>359</sup> Bourdieu identifies acts of judging as performative utterances, as they succeed in creating things, situations "in which no one can refuse or ignore the point of view, the vision, which they impose." The law, Bourdieu argues, "is the quintessential form of 'active' discourse, able by its own operation to produce its effects." Bourdieu, "The Force of Law," 387.

<sup>360</sup> Fieldnotes, July 28, 2006.

<sup>361</sup> See Chapter One of this dissertation

<sup>362</sup> Interview, June 22, 2006.

### *The “negative” certiorari*

Among the different mechanisms through which access to the Supreme Court is controlled,<sup>363</sup> the most relevant—and controversial—is the one prescribed in Section 280 first paragraph of the Federal Code of Civil and Commercial Procedure (hereinafter “the 280,” as it is used in the Court staff’s language).<sup>364</sup> This mechanism was thought as a remedy for the dramatic enlargement of the Court docket in the last

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<sup>363</sup> As I briefly indicated in *supra* note 327, the jurisdiction of federal courts (the Supreme Court and lower courts) is established in the Constitution. Section 116 sets up the contours of federal courts’ jurisdiction: in “all matters regulated by the Constitution and the laws enacted under its authority; the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more provinces, between one province and the inhabitants of another province; between the inhabitants of different provinces, and between one province or the inhabitants thereof against a foreign state or citizen.” With respect to the jurisdiction of the Supreme Court, Section 117 establishes that in all the aforementioned matters, the Court’s jurisdiction is “appellate” with the regulations and exceptions that Congress may prescribe, though it also makes clear that in the matters concerning foreign ambassadors, ministers and consuls, and in those in which a province is a party, the Court exercises “original and exclusive” jurisdiction. A reader familiar with the U.S. Court’s system probably will notice the commonalities between these texts and that of Article III, Section 2 of the Constitution of the United States. In addition to the Constitution, the Court’s original jurisdiction is regulated by Section 23 (last part) and Section 24, subsection 1 of the decree-law 1285 of 1958. See: María Cecilia Hockl and David Duarte, *Competencias y atribuciones de la Corte Suprema de Justicia de la Nación* (Buenos Aires: Legis, 2005) 45. For their part, cases of appellate jurisdiction, as defined in Sections 116, 117, and in the first part of the Constitution establishing Declarations, Rights and Guarantees (matters of federal law) can be reviewed through two main mechanisms: ordinary appeal (*recurso ordinario*) and extraordinary appeal (*recurso extraordinario*). Ordinary appeals are governed by Section 24, subsection 6: cases in which the federal government is a party, directly or indirectly, if the sum at issue exceeds a specific amount; cases of criminal extradition; cases involving naval embargoes. Extraordinary appeals, in turn, are used to remedy violations to the Constitution, and federal laws and procedures. They are established in Law 48, August 25, 1863, *R.N. 1863-1869, 49*, Section 14 (1863); Law 4055 section 6; Decree-law No. 1285, February 4, 1958, *B. O. 18581, 1*, Section 24, Subsection 2; and the Federal Code of Civil and Commercial Procedure, Sections 280 and 285. Legal scholars point toward the U.S. Judiciary Act of 1789, Section 25 as the source of Law 48 (on jurisdiction of federal courts and Supreme Court’s jurisdiction). See: Jonathan Miller, Susana Cayuso and María Angélica Gelli, *Constitución y Poder Político, jurisprudencia de la Corte Suprema y técnicas para su interpretación* (Buenos Aires: Astrea, 1995) 413-14; Lino Enrique Palacio, *Manual de Derecho Procesal*, Decimotercera Edición Actualizada (Buenos Aires: Abeledo-Perrot, 1997) 102.

<sup>364</sup> As it emerges from the statistics compiled by the Argentine Judicial Power in the year 2006 (the latest available information), 2,333 appeals filed to the Court were rejected based on Section 280, out of a total of 4,926 appeals rejected. This data excludes appeals filed in the Court by retirees which are recorded separately. Thus, if we add the number of these latter appeals that were rejected on the 280 grounds (610), the figure rises to 2,943 (out of a total of 5,654 appeals rejected in 2006). See: Poder Judicial de la Nación, Oficina de Estadísticas, [http://www.pjn.gov.ar/99\\_varios/estadisticas/Libros/Estadi\\_06/Indice06.htm](http://www.pjn.gov.ar/99_varios/estadisticas/Libros/Estadi_06/Indice06.htm) (accessed August 12, 2008).

decades,<sup>365</sup> as it grants the Court discretionary power to deny applications for extraordinary appeal<sup>366</sup> when the alleged breach to federal law or federal question does not suffice to hear the case, or the issues involved are not substantial or not transcendent.<sup>367</sup> That is to say, through this statutory provision, the Court is entitled to refuse to hear a given extraordinary appeal without giving any reason of denial to the parties (as in my case). It is a matter of judicial discretion—Court’s “good judgment” (*sana discreción*) as provided by the statute.

The Court’s judgment resulting from the application of the rule of Section 280 is presented in the form of a laconic and formulaic decision, to the extent that Court staff refers to it ordinarily as the “template” or formula 1 (“the template is the

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<sup>365</sup> Since the 1950s the use of both the extraordinary appeal and the appeals submitted for review of denial of extraordinary appeals has grown dramatically to the extent that these kinds of appeals far exceed the use of the ordinary appeal. The excessive growth of these two appeals (*recurso extraordinario* and *recurso de queja*) has been due to two doctrines created by the Supreme Court itself: the question of “arbitrariness” or “arbitrary decision” (*arbitrariedad* or *sentencia arbitraria*) and the question of “imperative institutional importance” (*gravedad institucional*), which, in fact, expanded the Court’s appellate jurisdiction beyond its legal regulation, permitting the tribunal to hear cases that did not meet the requirements for extraordinary appeals or did not involve strictly federal questions. See, e.g.: Genaro Carrió, “Don Quijote en el Palacio de Justicia (La Corte Suprema y sus problemas),” *La Ley*, T 1989-E Sec. Doctrina, 1131-49, 1143. As a way to counteract the relentless enlargement of the Court docket resulting from the Court’s increasing reliance on these two doctrines, Congress amended the federal procedural code Sections 280 and 285 granting the Court the discretionary power to reject extraordinary appeals. See: Supreme Court bylaw No. 44 C.S.J.N. 312 Fallos 1515-1519 (1989); María Angélica Gelli, “Dilemas del Recurso Extraordinario Federal” *La Ley* T 2004-Sec. Doctrina, 1306-7; Augusto M. Morello and Ramiro González Cuello, “La competencia de la Corte Suprema: presente y futuro”, *La Ley*, T. 2005-E, 1014-1026.

<sup>366</sup> Extraordinary appeals are filed to the lower court whose decision is being challenged. This court may either grant or reject the appeal. If the extraordinary appeal is granted, then the case is sent to the Supreme Court for review. If the lower court rejects the appeal, then the litigants can file a “complaint” appeal (*recurso de queja* or *recurso de hecho*) directly to the Supreme Court asking it to decide whether or not the lower court’s refusal was correct. The same procedure applies in the case of ordinary appeals. See: Roland Arazi, *Derecho Procesal civil y comercial, partes General y Especial*, Segunda Edición actualizada y ampliada (Buenos Aires: Astrea, 1999), 528; Víctor De Santo, *Tratado de los Recursos Tomo II Recursos Extraordinarios*, Segunda edición actualizada (Buenos Aires: Editorial Universidad, 1999), 521; Miller et al., *Constitución y Poder Político*, 412.

<sup>367</sup> [...] La Corte, según su sana discreción, y con la sola invocación de esta norma, podrá rechazar el recurso extraordinario, por falta de agravio federal suficiente o cuando las cuestiones planteadas resultaren insustanciales o carentes de trascendencia.” Código Procesal Civil y Comercial de la Nación, art. 280, as amended by Law No. 23.744, April 16, 1990, B.O. 26864, 1.

judgment”).<sup>368</sup> Decisions based on the 280 are structured in a single-sentence customary format that reads (Figure 10):

Buenos Aires, [date]

Given [literally “Seen”]: [citation of the case]

Whereas:

That the extraordinary appeal is inadmissible (Civil and Commercial Procedural Code of the Nation, section 280).

On this ground, rejects the extraordinary appeal. Notify and return.

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<sup>368</sup> Interview, October 30, 2006.

M. 590. XLIII.  
Marconi, Ricardo Pedro c/ A.A. Aerolíneas  
Argentinas S.A. s/ despido.

Buenos Aires, 22 de julio de 2008

Vistos los autos: "Marconi, Ricardo Pedro c/ A.A. Aero-  
líneas Argentinas S.A. s/ despido".

Considerando:

Que el recurso extraordinario es inadmisibile (art  
280 del Código Procesal Civil y Comercial de la Nación).

Por ello, se desestima el recurso extraordinario. Noti-  
fíquese y devuélvase. RICARDO LUIS LORENZETTI - ELENA I  
HIGHTON de NOLASCO - CARLOS S. FAYT - JUAN CARLOS MAQUEDA.

ES COPIA

Recurso extraordinario interpuesto por el perito ingeniero Ricardo Carlos Arambur  
con el patrocinio del Dr. Andrés Ignacio Aramburu.  
Tribunal de origen: Cámara Nacional de Afiliaciones del Trabajo, Sala VIII.  
Tribunales que intervinieron con anterioridad: Juzgado Nacional del Trabajo Nº 2

**Figure 10. The “template”, or judgment based on Federal Civil and Commercial  
Procedural Code, Section 280**

The 280 is a practice that my interlocutors both inside and outside the Court understand and perceive as a mimicry of the U.S. Court’s *writ of certiorari*, one of the tools through which the U.S. Court decides to take jurisdiction.<sup>369</sup> However, unlike the

<sup>369</sup> “Es, asimismo, un criterio coincidente con el que, desde ya hace tiempo, ha venido aplicándose respecto de una Corte de *obligada referencia*, la norteamericana” (italics added). Supreme Court bylaw No. 44, C.S.J.N. 312 Fallos 1515-19 (1989). Likewise Lino Palacio recalls the US writ of certiorari as one of the precedents that Congress discussed at debate about the bill that introduced into the Argentine code of Civil and Commercial Procedure. Lino E. Palacio, *El Recurso Extraordinario Federal, Teoría y Práctica* (Buenos Aires: Abeledo-Perrot, 2001), 26. See also: Néstor Pedro Sagüés, “El writ of certiorari argentino (Las reformas de la Ley 23.774, respecto al recurso extraordinario)”, *La Ley*

U.S. Court where the certiorari works as a selection process of the cases that the Court chooses *to hear*,<sup>370</sup> the so-called certiorari in the Argentine judicial practice is presented as a procedure that allows the Argentine Court *not to hear* a case from the thousands of cases that are filed annually. This modality has made the law clerks with whom I discussed the practice of the 280 in Argentine Court, name this practice as a “negative” certiorari of the one practiced by the U.S. Court, which they identify as an “affirmative” or “positive” one.<sup>371</sup> Even more remarkable is that Argentine clerks take the difference between their practice and that of the U.S. Court for granted, as much as they assume that the local rule of section 280 is a genuine certiorari.<sup>372</sup> Seen from the clerks’ vantage point, what would work to open the American Court’s jurisdiction, in the Argentine Court’s practice is thought and conceived as a closing mechanism of the tribunal’s authority. Nonetheless, as I briefly mentioned above, clerks find that the local practice has not been able to reduce the number of cases that are filed everyday; “filing an appeal to the Court is rather accessible,” a clerk explained to me.<sup>373</sup>

Outside the Court, the challenges to the practice of certiorari as performed by the Argentine Court—in particular to the incorporation of the certiorari into the Court practices<sup>374</sup> via the procedural code reform—are abundant: building upon either formalistic or culturalist arguments, these critiques point toward either the reformers’

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T.1990-C, 717-724; Alberto F. Garay, “Comentario sobre las reformas al recurso extraordinario”, *La Ley* T-1990; 984-1002.

<sup>370</sup> See: Rules of the Supreme Court of the United States (Adopted July 17, 2007, Effective October 1<sup>st</sup> 2007), Part III: Jurisdiction on Writ of Certiorari, Rules 10 to 16, <http://www.supremecourtus.gov/ctrules/2007rulesofthecourt.pdf> (accessed July 29, 2008). In particular, Rule 10 (Considerations Governing Review on Writ of Certiorari) begins with the following statement: “A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.”

<sup>371</sup> Interviews, June 22, 2006, August 18, 2006, July 25, 2008.

<sup>372</sup> Fieldnotes, July 25, 2008.

<sup>373</sup> Interview, October 30, 2006.

<sup>374</sup> Bianchi and Gelli, among others, argue that the Argentine Court practiced a sort of *de facto* certiorari even before the amendment to the procedural code, Section 280. See: Alberto B. Bianchi, “El ‘Writ of Certiorari’ en nuestra Corte Suprema (La ‘cuestión federal suficiente’ como concepto jurídico indeterminado,” *El Derecho* 125 (1989): 857-865; María Angélica Gelli, “El writ of certiorari en perspectiva,” *La Ley*, T.1994-B Sec. Doctrina, 880-890.

misreading of the rules and mechanisms that they were “transplanting” from the U.S. Court,<sup>375</sup> or their lack of awareness of the local *mentalité*<sup>376</sup> in interaction with the imported legal idea. In either way, the so-called “Argentine certiorari”<sup>377</sup> is seen as the result of a failed legal transplant or of a partial translation.<sup>378</sup>

Central to the culturalist critique of “the 280” is the argument that the Court’s discretionary dismissal of cases is at odds with a transparent reasoning requiring judges to explain their decisions and hence to offer the reasons for denial. Indeed, the critique builds on a wider standpoint from which the refusal to disclose judicial votes is seen as a breach of the basic tenet of the rule of law that requires government decisions be made public.<sup>379</sup> Ultimately, the critique goes, the lack of argumentative transparency contributes to the undermining of judicial authority. But more importantly, underlying this critical stance toward this particular judicial practice is a

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<sup>375</sup> See, e.g.: Garay, “Comentario sobre las reformas al recurso extraordinario”; Héctor Sabelli, “El rechazo ‘sin motivación’ del recurso extraordinario cuando la cuestión federal es intrascendente, es constitucional? (sobre el certiorari criollo),” *Jurisprudencia Argentina*. 2000-3, 1343-1362. Both authors point out the differences between the U.S. certiorari and the Argentine certiorari.

<sup>376</sup> “Pero lo que no se ha tenido en cuenta es que este instituto [certiorari] repugna a los antecedentes y a la idiosincrasia nacional, formada alrededor del derecho continental europeo, incluso a los de la misma Corte...” José María Olcese, “La institución del ‘certiorari’ repugna al concepto nacional de derecho de defensa”, *La Ley* 1999-IV, 981-984, 984.

<sup>377</sup> *Ibid.*

<sup>378</sup> The adequacy of the legal transplant metaphor to explain the circulation and transference of legal institutions and practices among societies and jurisdictions has been largely criticized. Building upon a culturalist approach to law, comparative and socio-legal scholars have proposed other analytical categories to examine these phenomena, challenging, in this way, the formalistic view of law embedded in the transplant metaphor. See, e.g.: Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences,” *Modern Law Review* 61 (1998):11-32; Máximo Langer, “From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure,” *Harvard International Law Journal* 45 (2004):1-64. Annelise Riles, for her part, notes that in drawing on the cultural argument to challenge the dogmatic understanding of law as a set of rules advanced by the legal transplant metaphor, some comparatists take culture as “an integrated, totalizing whole,” a concept that anthropologists have been rejecting since the 1960s. Riles, “Comparative Law and Socio-Legal Studies,” 798.

<sup>379</sup> See: Gelli, “Dilemas del Recurso Extraordinario Federal”; Sabelli, “El rechazo ‘sin motivación’ del recurso extraordinario cuando la cuestión federal es intrascendente, es constitucional?; Olcese, “La institución del ‘certiorari’ repugna al concepto nacional de derecho de defensa.” Along the same lines, other critics argue that this practice violates the constitutional due process of law and equal protection clauses. See, e.g.: Hércules, “La sana discreción de la Corte viola el principio de igualdad,” *Jurisprudencia Argentina*, Tomo II (2005) 785- 786.

notion of adjudication in which judicial reasoning is reduced to (or even replaced by) its visible end: the final decision, the ruling. Borrowing from Mitchel Lasser's material:

The legitimacy of a given judicial decision thus stands and falls in large measure on the logic and argumentation of the signed judgment, not on the structural legitimacy of the entire judicial apparatus from which it hails.<sup>380</sup>

In sharp contrast to this view, the judges and judicial bureaucrats that I encountered in the Court approach judicial reasoning—and judgment itself—not as an isolated outcome or rule but as an institutional process.<sup>381</sup> Thus, from this latter standpoint, judgment (including judgment decided upon Section 280) would emerge as the result of the textual exchanges and interactions that flow alongside the internal circulation of the dossier. In other words, by virtue of these subjects' contrasting points of view about judgment, this is seen as a continuum and gapless process from inside the Court, while it is also apprehended as a disruptive gap in judicial adjudication from the outside.

### ***The “Memo” and the possibility of knowledge***

In his book *Judicial Deliberations* comparative legal scholar Mitchel Lasser traces an interesting correlation between three allegedly different modes of judicial decision-making (the U.S. Supreme Court, the French *Cour de cassation*, and the European Court of Justice) and the vision of republic, democracy, law, etc. that these

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<sup>380</sup> Mitchel de S.O.-I.-E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2005), 338.

<sup>381</sup> This, however, does not mean that my subjects endorse the old legal anthropology “processual model” school which opposed the idea of law as an institutional process to that of law as merely a set of norms or rules. See: John L. Comaroff and Simon Roberts, *Rules and Processes, The Cultural Logic of Dispute in an African Context* (Chicago: The University of Chicago Press, 1981).



modes represent.<sup>382</sup> Through an insightful comparative endeavor, Lasser actually challenges the alleged antithesis between common law (in its American version) and civil law (represented by the French legal tradition) based on the assumption that transparency, deliberation, accountability and legitimacy—“the very backbone of Karl Llewellyn’s ‘Grand Style’ of American judicial decision-making”<sup>383</sup>—are exclusively encountered through a mode of adjudication built upon “individually signed opinions (including concurrences and dissents), the disclosure of judicial votes, the forthright recognition of interpretive difficulties, the candid discussion of judicial legal development, and public judicial debate over substantive policy issues.” From an American comparative perspective, Lasser remarks, this combination is assumed to foster “judicial accountability and control, to encourage democratic debate and deliberation, and thus to accord well-deserved legitimacy to American judicial power.”<sup>384</sup> In this schema, he explains, civilian judicial decision-making is portrayed as a system that lacks appropriate legitimacy because judicial decisions are not sufficiently transparent.<sup>385</sup>

More specifically, I am interested in particular in Lasser's description of the radical “bifurcation” of the judicial discourse that operates in the French *cour*: on the one hand, he finds that the form and tone of the “official” decisions of the *cour* (collegial, syllogistic and magisterial), reinforces the image of the French judicial system as a formalist application of codified law. On the other hand, Lasser’s work uncovers an “unofficial” argumentative sphere of *conclusions* and *rapports* in which socially meaningful judicial solutions are constructed through hermeneutic

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<sup>382</sup> Lasser, *Judicial Deliberations; A comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press)

<sup>383</sup> *Ibid.*, 3.

<sup>384</sup> *Ibid.*, 4. “In the United States, legal theory has long associated transparently reasoned individual judicial opinions with judicial control and accountability, democratic debate and deliberation, and ultimately judicial legitimacy itself.” Lasser, *Judicial Deliberations*, 3.

<sup>385</sup> *Ibid.*, 61.

discourse.<sup>386</sup> For Lasser, the bifurcation of French civil judicial discourse is explained by a complex conceptual and institutional framework in which judges *must not* and *cannot* make the law though they must be technically sophisticated managers capable of adapting and modernizing judicial norms in order to respond to changing social needs in a manner that promotes general interest.

I bring attention to Lasser's work here because the mode in which gatekeeping practices are performed in the Argentine Court through Section 280 unfolds a process of bifurcation in the legal discourse that resembles the "argumentative bifurcation" that he encounters in the judgments of the *cour de cassation*.

When I examined in the previous chapter the forms through which the subjects of legal bureaucracy make themselves visible, I described how the material circulation of dossiers within the judicial apparatus was also physically manifest in the Court bureaucrats' papering practices: in their drafting proposals for judicial decisions (*proyectos de sentencia*), writing memoranda, reports, as well as any research documents that might be helpful to build up a judgment on a given dossier, such as the attachment of previous documents written on similar cases, or statutory provisions regulating the issues involved. To put it differently, in the Argentine case, all these documentary practices, epitomized in the writing of the "memo" (or the "note of *secretaria*"),<sup>387</sup> are the venue in which argumentation and persuasion takes place, the instance in which judges and clerks deploy all their argumentative resources to convince their brethren to adopt a particular decision on the case at issue, though all this "argumentative arsenal" (Lasser's terms) remains veiled to the external gaze. In a law clerk's words: "the case must be studied, and the memo reflects such study; [...]"

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<sup>386</sup> Ibid., 200-202.

<sup>387</sup> When this document is prepared by a law clerk in a *secretaria*, it is called "nota de secretaria" (secretaria note). However, I refer here to both the memorandum and the note of secretaria indistinctively as the "memo," as my informants usually do.

without the memo, nothing is convincing ...The memo is like a dialogue, as most of the time deliberation here in the Court is written.”<sup>388</sup> However, as one of the Court clerks confided to me, “the better the memorandum is written at the outset, the faster the decision on the case will be achieved,” meaning that an exhaustive memorandum is most likely not to be challenged.<sup>389</sup> In contrast to the succinct structure of judgment based on Section 280 described above, the memorandum does not have a predetermined length. It can be as long as the author deems necessary to present her arguments in support of the judicial decision that she is proposing. Yet, the memo is structured in the following order:

On the top right hand: the complete heading of the dossier (type of appeal, number and the appellant’s names). For instance: “Extraordinary Appeal B. 1408 XL. *Barrera, Leticia v. Government of the City of Buenos Aires.*” On the top left, the name of the office where the author of the memorandum works: either a Justice’s *vocalia* or one of the seven judicial *secretarías*. In this latter case, the memorandum is specifically called *nota de secretaría* (secretary note) and is generally initialed by the author.<sup>390</sup> On the left margin, the subject of the memorandum: the type of appeal under review (either an extraordinary appeal, or an appeal seeking reversal of the appeal court’s denial of extraordinary review) followed by the indication of the court of original jurisdiction (where the action was initiated and first heard) and the lower instance courts that heard the case before it reached the Supreme Court (a federal court of appeals or a Provincial court of last resort).

With respect to the main text, it is presented in a “chronological order”:<sup>391</sup>

- the statement of facts;<sup>392</sup>

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<sup>388</sup> Interview, June 20, 2006.

<sup>389</sup> Interview, November 2, 2005.

<sup>390</sup> See Chapter Three of this dissertation.

<sup>391</sup> Interview, July 25, 2008.

<sup>392</sup> In the few memos that I could access, the presentation of facts ran about three pages.

- the description of the decision of the court of appeals or court of last resort whose reversal the appellant seeks;
- the presentation of arguments exposed in the federal appeal submitted to the Court;
- the author's (clerk's) opinion (*consideraciones*) providing her understanding of the law that applies to the issues involved in the appeal and the proposed judicial decision. If in the author's opinion the appeal should be rejected, her report usually concludes with the recommendation for the Court to apply the current "formula 1" to the case (Section 280).

The memo is often attached to the draft of the proposed judicial opinion that it (the memo) supports. If different judicial decisions leading to opposed results are drafted on the same case, all of them are "backed" by their respective memoranda explaining the reasons for such conclusions. All these documents are enclosed in a yellow folder that is annexed to the dossier and circulated alongside even though they are not considered to be "officially" part of the dossier itself, at least in the sense that they are not physically integrated to the main dossier, and, unlike the main dossier, they cannot be accessed by the parties.

This particular feature of the memo—that is, the duality of being considered as intellectually fundamental though materially excluded from the official dossier—is most palpable in the process of tracking down one's dossier at the Court. As I noted earlier, in this proceeding one is presented with a version of the dossier in which only its ends (the application for review or lawsuit, the final ruling, or, if in the case, an intermediate decision) are made public. Once the Court's judgment is delivered and the parties are notified, the dossier is sent to the Court's general archive, whereas all the attached documents (memoranda, proposed decisions, and any other document collected as research material for the case and hence enclosed in the yellow folder) are

compiled in a binder by the staff of the secretaria that supervised the circulation of the dossier. This binder, so-called “cartapacio de secretaria,” is kept for the secretaria’s record and can be accessed only by the Court staff—for instance as research material in future and similar cases.<sup>393</sup>

Notably, the above bifurcation of judicial reasoning is encountered in the appeals in which full review is granted by the Argentine Court as in the applications for review that the Court rejects on the grounds of Section 280, since the memo is produced in preparation of every Court decision. Nonetheless, the effects of this bifurcation are more likely to be experienced as disruptive in the appeals that the Court rejects than in the cases in which it grants full review. In the appeals that are granted full review, the arguments developed in the memorandum—or in the various memoranda if that is the case—explaining the reasons for the legal opinion finally endorsed by the majority of Justices are most likely to be reproduced (although heavily edited) and published in the judgment. In other words, the arguments discussed in the memorandum make up for the decision’s rationale (*fundamentos*). In contrast to this, when the appeal is rejected on the basis of Section 280, the reasons or *fundamentos* for such a decision “never make [their] way out of the Court’s internal dossiers.”<sup>394</sup> Notably, this is the point where gatekeeping practices can be mostly perceived as “naming” practices that operate to define what is of public domain and what is private, rather than as simple instruments to control the Court’s docket.

Both practical and political considerations would justify, in clerks’ view, the Court’s sheltering deliberation of 280 cases in its internal workings: on the one hand, it is said that the current Court workload would make impossible to turn all the

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<sup>393</sup> Interview, July 25, 2008.

<sup>394</sup> Lasser, *Judicial Deliberations*, 52.

reasoning developed in the memo into the final ruling.<sup>395</sup> On the other hand, keeping the memo as a Court's internal document, a clerk of a *secretaría* indicated, allows [him, his colleagues] "to write things that *cannot* be said in the final ruling." As he explained to me, "The Court can get itself bound by its own words...it [the Court] has to be careful with its saying. The Court is constrained by what it *has* to say in a given case and by the terms of the remedy it provides."<sup>396</sup> Thus, seen from this perspective, the memo is more than the "informal" and "personal"<sup>397</sup> explanatory device, the means "to convey one's legal opinion on the case,"<sup>398</sup> that accompanies and supports a proposed judicial decision. The memo also elicits a moment of expansion<sup>399</sup> in which knowledge is temporarily freed from the physical and political constraints of legal

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<sup>395</sup> Interview February 21, 2006. Similarly, U.S. Court Justice Frankfurter's opinion respecting the denial of the petition for writ of certiorari in *Maryland v. Baltimore Radio Show, Inc.*, goes along the same argumentative line as that indicated above: "Since there are these conflicting, and, to the uninformed, even confusing reasons for denying petitions for certiorari, it has been suggested from time to time that the Court indicate its reasons for denial. Practical considerations preclude. [The] time that would be required is prohibitive...." 338 US 912, 70 S.Ct. 252, 94 L.Ed. 562 (1950).

<sup>396</sup> Interview October 30, 2006. Procedural rules request that petitions filed to the Court seeking review of judgments be submitted in "stand-alone" format, that is, that the questions are expressed concisely in relation to the circumstances of the case—which, in light of this rule, should become themselves the evidence for the petition—and to the sections of the Constitution, federal statutes or international treaties, challenged by the judgment sought to be reviewed. See: Law No. 48, August 25, 1863, R.N. 1863-1869, 49, section 15. As this rule also mandates, only the questions set out in the petition are considered by the Court in consonance with the larger principle of civil procedure that a court must limit its power to adjudicate an action to the issues discussed in the dossier; that is to say, that the court should restrain itself from issuing a decision that would be either more than requested by the parties (*ultra petita*), or not requested at all (*extra petita*). However, beyond these procedural requests, the above clerk's account about keeping the memorandum *off the record*, clearly points toward a commonsensical effect associated with files and record-keeping practices: the possibility of checking, comparing, and assessing the reliability of what is put on record that documents enable; in other words, they are binding instruments. Thus, recalling the clerk's words, one might think of the concealment of the memorandum that operates within the Court, as the ordinary reaction of bureaucracy administration to "the fact that everything that is put on file threatens to turn up against those who keep the records." In case of doubt, Visman remarks, "the file testifies against the clerk." Cornelia Visman, *Files: Law and Media Technology*, translated by Geoffrey Winthrop-Young (Stanford, CA: Stanford University Press, 2008)146.

<sup>397</sup> Interview January 17, 2007.

<sup>398</sup> Ibid

<sup>399</sup> I have in mind here the aesthetics of the bracketed text in international agreement negotiations, as described by Annelise Riles. "For negotiators were not asides, pauses, or explanatory devices, but focal points to which attention was immediately drawn. The argument happened within the brackets." Annelise Riles, *The Network Inside Out* (Ann Arbor: University of Michigan Press, 2001) 85.

forms (e.g. the application for review, the judgment, the dossier)<sup>400</sup> that anticipate such knowledge or action.<sup>401</sup> “All that is not written in the draft [of the judicial decision] is in the memo”;<sup>402</sup> although all the constellation of meaning that the memo elucidates is “backgrounded, held at bay”<sup>403</sup> for the Court’s authority to work out.

### ***The reflexive path of the Law***

Unlike Lasser’s work about the *cour de cassation*, I could not find in my research any correlation between the practices of the Argentine Court and an indigenous idea of law and judicial decision-making that these practices might reflect.<sup>404</sup> As an anecdote from the field, however, I may tell that in an early stage of my fieldwork I decided to play with Lasser’s idea of correlation in order to provoke my informants’ reactions, in particular those of the Supreme Court Justices. Unfortunately, it did not work. Or perhaps I thought it did not work at that moment, because I could not make sense of any hint of correlation between the Argentine Court’s discursive practices and an established idea of law, republic and democracy in Argentina from my informants’ responses. “There are so many ideas here about what the law is,” a Justice told me, pointing out different and even conflicting notions of law within the Court, and even within the small circle of his Supreme Court colleagues.<sup>405</sup> “It is almost impossible to find a pattern of the Court’s decisions,” a Justice’s clerk noted, pointing out to me what she saw as the Court’s erratic case law in the last years—by “pattern” she understood a stable and coherent line of precedents.

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<sup>400</sup> As I noted in Chapter Two of this dissertation, in the Argentine judicial system, dossiers set up the epistemological borders to judicial knowledge. Indeed, for judicial actors, knowledge is contained *within* the dossier. In this sense, the making of the memorandum allows clerks a certain margin of maneuver; that is to say, if not to escape from the limits of the dossier, at least to extend them. Fieldnotes, October 30, 2006.

<sup>401</sup> See: Charles M. Yablon, “Forms,” *Cardozo Law Review* 11 (1989-1990): 1349-1353, 1351.

<sup>402</sup> Interview January 17, 2007.

<sup>403</sup> See; Riles, *The Network Inside Out*, 86.

<sup>404</sup> Needless to say, my approach prioritized the engagement in ethnography rather than textual theory.

<sup>405</sup> Interview, November 24, 2005.

Yet, when I queried a few clerks about the Court's discursive practices, they reacted to my questioning with isolated comments about the so-called "Court's writing style," which, in their view, was being gradually abandoned by the Court new-comers, namely, the lastly appointed Justices and their clerks. Additionally, a few of them mentioned to me an unofficial manual of style written by an ex-Court Justice that still circulated among the Court staff.

Despite the above arguments about the shifting discourse in the Argentine Court, a closer analysis of the Court's discursive practices, specifically of the workings of the gatekeeping practice of Section 280, unfolds two stable and competing understandings about judicial adjudication depending on the subjects' positions *vis-à-vis* the judicial apparatus. As I noted earlier, on the one hand, adjudication is perceived and experienced, from an internal point of view, as a sole and collective process actualized in the circulation of the dossier within the Court. Accordingly, for judicial bureaucrats, judgment is achieved, contested and negotiated through a work of "intertextuality"<sup>406</sup> manifested in the material aggregation of pages to the circulating dossier—this latter understood in a broad sense, as encompassing the main body and the annexed folder(s). However, it is only from the vantage point of legal bureaucrats, in which the forms of judicial lawmaking are perceived as a whole, where both the "official" and "unofficial" discourses are brought together<sup>407</sup>—or borrowing from Tony Crook, from which *both* sides "the clear and the hidden"<sup>408</sup> can be seen—that adjudication can be understood as a processual and deliberative

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<sup>406</sup> Bruno Latour, *La Fabrique du droit. Une ethnographie du Conseil d'Etat* (Paris: La Decouverte/Poche, 2004), 105.

<sup>407</sup> Lasser, *Judicial Deliberations*.

<sup>408</sup> Tony Crook "Growing Knowledge in Bolivip, Papua New Guinea," *Oceania* 69, 1999: 225-242, 240.



phenomenon. It, therefore, is by putting the hidden in clear vision that such meaning achieves a moment of completion.<sup>409</sup>

On the other hand, if we look at the parties to a case and their counsels, who after years of pursuing litigation throughout the judicial system receive as judgment solely a piece of paper with a one-sentence decision, then it is most likely that what is perceived internally as a “perfect” mechanism may be perceived as a failure of knowledge<sup>410</sup>—a failure that the practice of adjudication reveals—from an outsider’s point of view; a failure built into the Court’s practice of adjudication as the above critiques of the Court’s application of Section 280 pointed out (here, adjudication is represented and substituted by the plain text of the decision).

This dual perception about judicial decision-making practices becomes most evident by the opposed, albeit mutually enabling, metaphors about death that in the lapse of only a few days two different informants, a legal scholar and practitioner and a Court law clerk, built upon to explain their understandings of the Court’s working under Section 280. After making clear that he was aware of the argumentative sphere “hidden” behind the Court’s gatekeeping practice, the former interlocutor drew a comparison between the reactions to the Court’s denial of a petition based on Section 280 and to a relative’s death: “you feel frustrated...you always will think that things could have happened differently; that something else might have been done to lengthen your kin’s life.”<sup>411</sup> I then asked him why the reaction he was describing would be distinctive of a 280 case and not a common response to any negative decision one might get from any tribunal. He replied that this first reaction—

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<sup>409</sup> Ibid. Likewise, Latour points out the capacity of the dossier to operate as a disclosure and enclosure artifact at the same time: “En effet, le dossier a une propriété capitale bien connue des ergonomes et des anthropologies de la cognition: tout y est à la foi présent et celé.” Latour: *La Fabrique du droit*, 105.

<sup>410</sup> See: Annelise Riles, “Real Time: Unwinding technocratic and anthropological knowledge”

*American Ethnologist* 31: 3 (2004): 392-405, 396.

<sup>411</sup> Interview, July 21, 2008.

frustration—was indeed a response to the denial and to the impossibility to reverse this situation. However, in a second moment, when one realizes that no reason for denial is given, the initial frustration is even stronger; much more if the appellant’s counsel has no previous experience in arguing before the Court. “If he [the counsel] has a record in the Court, it is most likely that he knows about the existence of the memo”; though even in this event, a strong feeling of frustration prevails, he asserted.<sup>412</sup>

Metaphors work on the basis of the explicit or implicit “identification of one phenomenon with another phenomenon from which the first is literally distinct.”<sup>413</sup> But yet, calling a court denial “death” seemed quite an extreme move, unnecessary hyperbole—even when knowing the causes of such death was foreclosed. To stick to this hyperbole, however, would distract attention from what I believe is the real ground for this lawyer’s metaphor: the character of legal knowledge, which autopoietic theorists Niklas Luhmann and Gunther Teubner have described as a self-referential structure.<sup>414</sup>

Legal discourse, Teubner argues, works on normative self-reference and recursivity:<sup>415</sup>

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<sup>412</sup> Ibid

<sup>413</sup> See: Bernard J. Hibbits: “Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse” *Cardozo Law Review* 16 (1994): 229-356, 233. Metaphor arises intuitively out of the analogy between different things. There is an incongruity of sense on one level that produces an influx of significance on another. See, generally: Jorge Luis Borges, “La Metafora,” in *Jorge Luis Borges, Ficcionario, Una antologia de sus textos*, Emir Rodriguez Monegal (ed), Mexico, D.F. Fondo de Cultura Economica, 2nd edition, 1999, 310-312; Clifford Geertz, *The Interpretation of Cultures, Selected Essays* (Basic Books, 1973), 310-312.

<sup>414</sup> See: Gunther Teubner, “Autopoiesis in Law and Society: A Rejoinder to Blankenburg,” *Law and Society Review* 18:2 (1984): 291-301; *Law as an Autopoietic System* (Oxford: Clarendon Press, 1993). Luhmann and Teubner see the legal system in the framework of functionalist systems theory, that is, as a system of actions “comprising not only legal discourse about norms or organized action like court decisions and legislation, but any human communication which has reference to legal expectation.” Niklas Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt 1981), 35 (quoted in Teubner, “Autopoeisis in Law and Society,” 294). This definition of law excludes the concrete acting individual. Ibid.

<sup>415</sup> Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up with New Divergencies,” *The Modern Law Review* 61 (1998): 11-32, 16.

The self-referential closure of the legal system can be found in the circular relation between legal decisions and normative rules: decisions refer to rules and rules to decisions...This basal circularity is the foundation of legal autonomy.<sup>416</sup>

In explaining Teubner's work Riles indicates that law's reflexivity is the capacity of the legal systems "for building up its own autonomy by observing and commenting on themselves (as in legal debates about legal process)."<sup>417</sup> No external forces influence the mode in which law reproduces itself, its autopoietic organization<sup>418</sup>—likewise, legal knowledge "is not oriented toward an outside target ...even when it pretends to have a specific aim or target in mind."<sup>419</sup>

Precisely, the self-referential character of the law<sup>420</sup> is manifest in the Court's denial, not so much through the explicit reference to Section 280 made in the judgment—literally, the decision states that the appeal is not admitted only by invoking this norm<sup>421</sup>—as through the way in which gatekeeping is performed. This insight about law's self-reflexivity is most clearly explained by another metaphor drawn by a law clerk when he showed me the *cartapacio*, the binder made up of a

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<sup>416</sup> Teubner, "Autopoiesis in Law and Society," 295.

<sup>417</sup> Riles, "Comparative law and Socio-Legal Studies," 807.

<sup>418</sup> "Law becomes autopoietic to the degree that references to external factors, e.g. politics or religion, are replaced by references to legal rules (stemming from court decisions, doctrinal inventions, or legislative acts)." Teubner, "Autopoiesis in Law and Society", 295. For an ethnographic description about how the autopoietic quality of law is manifest in the workings of legal doctrine, see: Annelise Riles, "Property as Legal Knowledge: Means and Ends," *Journal of the Royal Anthropological Institute* (N.S.) 10 (2004): 775-795.

<sup>419</sup> Annelise Riles, "The Legal Fiction: Technical Hope at the Center of Capitalism," *Hope in the Economy*, Hiro Miyazaki and Richard Swedberg, eds. (forthcoming 2009).

<sup>420</sup> I agree with Mariana Valverde when she notes that even when "one can reject the depiction of law as an autonomous epistemic subject" as described by Luhmann and Teubner, one however may acknowledge their insights into the ways that "law creatively appropriates extralegal knowledges," that is, by "transmuting them into legal formats and frameworks." This highlights, she argues, "the way that law shapes the world that it then claims to adjudicate." This aspect of law is what I want to foreground here. See: Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton, N.J: Princeton University Press, 2003) 6-7.

<sup>421</sup> As I explained earlier, this is what petitioners to the Court and outsiders in general perceive.

composite of arguments, opinions, conclusions, and research materials “unofficially” annexed to the dossier along its circulation. “This is the corpse,” the clerk said to me while handing me the binder that was on his desk. “You can find in it all the forensic evidence and the clues to interpret a Court’s decision in every case.”<sup>422</sup> “Everything is there,” he asserted as I started perusing the binder I now had in my hands. Indeed, the material I was presented with came up as an assemblage of memoranda, opinions, drafted decisions, statutory provisions, newspaper articles, and other “physical evidence” of the same sort that appeared as key elements for the reconstruction of judgment. About his having this particular binder in his office, he explained to me that he had borrowed it from the archive of one of the *secretarías*; that he needed to read the content of this particular binder for an appeal he was currently reviewing—a memo written for this latter case cited the case discussed in the binder. When I asked him why he did not just go and read the cited ruling rather than examining all the data contained in the binder, he responded that that would *not suffice*; that he wanted to know what had *really* happened.<sup>423</sup> In other words, during the process of making a decision, the clerk locates knowledge in the Court’s own act of making the decision. Indeed, this clerk’s move transcends this pursuit of a particular knowledge for the case under his review. Rather, it speaks of a mode of operation, of knowledge making: it “reflexively constitutes the legal act,”<sup>424</sup> the decision.

Certainly the two metaphors discussed in this section reflect different and fixed understandings of the act of judicial decision-making from the point of view of the actors involved, either actively or passively. On the one hand, judicial practice is perceived as a mode of knowledge enclosure: there is nothing beyond judgment—

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<sup>422</sup> Interview, July 25, 2008.

<sup>423</sup> Ibid.

<sup>424</sup> Annelise Riles, “Law as Object,” in *Law & Empire in the Pacific, Fiji and Hawai‘i*, Sally Engle Merry and Donald Brenneis ed. (Santa Fe, NM: School of American Research Press, 2003), 194.

thus, my informant's analogy between judgment and death. In contrast to this, judicial decision-making is also presented as a form a disclosure enabling clerks, judges and other judicial bureaucrats (the forensic practitioners) an enduring possibility of knowing. But yet, more importantly, both metaphors allow me to move beyond the conflicting understandings and fixed appearances of judicial practice that they may enact.<sup>425</sup> Accordingly, as I showed above, both metaphors offer simultaneously the means for appreciating the practice of judicial decision-making as a self-referential form of knowledge-construction. In this light, enclosure may be seen as both the consequence and condition of disclosure.<sup>426</sup>

### ***Filling in the Gaps***

The main task of this chapter has been to provide a detailed description of how gatekeeping operates in the Argentine Court. In exploring this practice as multiple gaps—a gap in my dossier, a gap that litigants experience in their cases, a gap in legal knowledge, and as a gap between norm and reality, or law in the books and law in action—I have encountered a certain kind of knowledge that is not exactly known by its function and significance.

Accessing the memorandum, which my subjects' descriptions take as the site for the Court's internal deliberation in every case, it is certainly important to understand how judgment is articulated through a bifurcation of the legal discourse which the ethnographic observation amalgamates. Yet, knowing that this document (deliberation) is produced in preparation of every Court decision—that is, whether the Court decides to grant review or whether it is denied—is even more significant as it sheds light on the particular function that gatekeeping performs in this setting.

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<sup>425</sup> Donna Haraway, "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective," *Feminist Studies* 14: 3 (1988), 575-599, 589.

<sup>426</sup> Paul Kockelman, "Enclosure and Disclosure," *Public Culture* 19:2 (2007), 303-5, 304.

Building on Barbara Yngvesson's material, I described gatekeeping as a practice of exclusion that operates to keep the Court apart from the cases that are deemed to interfere with its responsibility and constitutional mandate, namely the "garbage cases." Additionally, I argued that exclusion and gatekeeping are themselves constitutive of judicial authority. Nonetheless, as my description of the practice of "the 280" unfolded, exclusion is performed in the Court through a deliberative instance similar to that encountered in the cases where the Court grants full review. At first glance, this finding would question the practice of the 280 on grounds that it might entail a failure of gatekeeping: the Court actually rules in garbage cases as much as in any other case it decides, rather than excluding them from its jurisdiction. It, however, would mean implicitly to place my observations in a comparative perspective from which I would be able to check the Court's inner workings against an ideal practice of gatekeeping—whether it may be the practice of certiorari as performed by the U.S. Court or whether it may be an ideal of this practice as imagined by my subjects. This is the gap—or in Boellstorff's words, the translation failure—that I tried to obviate at the outset.

Now, when attention shifts back to the aesthetics of the dossier, another gap, namely the Court's internal deliberation, is perceptible in the form in which the dossier is presented to, and grasped by "outsiders"; that is, through the dossier's visible ends (e.g. the negative decision in my case, the judgment denying review in a 280 case). This gap, in the account of the lawyer described above and in the understandings of those critics of the local practice of certiorari, is apprehended as a failure of legal knowledge. However, internally, from the Court bureaucrats' point of view, the concealment of deliberation is experienced as the space where knowledge achieves momentum through a whole sequence of knowledge-making practices. The knowledge that this gap elicits remains hidden; though in the cases that the Court

grants full review it nonetheless may emerge in the form of the decision's rationale. In contrast, when the Court denies application for review, knowledge is completely "backgrounded" in the laconic structure of the denial. Therefore, it is in this effort of keeping knowledge concealed from view that the practice of gatekeeping as encountered in the Argentine Court may be appreciated in its true dimension.

As the materials presented in this essay show, gatekeeping operates as a fiction of exclusion. The "As If" quality of the fiction<sup>427</sup> makes it possible to consider the appeals decided upon Section 280 as "garbage cases," that is, as cases that the Court excludes from its jurisdiction while, in fact, these cases are reviewed like almost any other appeal filed to the Court. However, as judicial decision-making is made explicit to the outside in the form of judgment, exclusion of garbage cases is presented "*as if* it were a fact."<sup>428</sup> This fiction, as I demonstrated in this essay, ultimately works as a mode of constructing judicial authority.

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<sup>427</sup> See: Annelise Riles, "The Legal Fiction: Technical Hope at the Center of Capitalism," 22.

<sup>428</sup> Ibid.

## CHAPTER 5

### PERFORMANCE, TRANSPARENCY AND THE MAKING OF A NEW INSTITUTIONALITY

The first public hearing in the so-called “Riachuelo”<sup>429</sup> case just began and we, the public, were watching it broadcast live in the Federal Court of Appeal’s room located in the ground floor of the Court’s building.<sup>430</sup> Among the audience, I recognized two Courts’ clerks I had interviewed months ago, two environmental lawyers, a watchdog organization member that I had seen on other occasions (in a public hearing held at the Senate and in a symposium on justice reforms). There were also a few researchers, but I only became aware of them later. Sitting just behind me, there was a group of people from the affected area (“vecinos de la zona afectada” as they were referred frequently in the litigants’ arguments), who were whispering critical comments as the Secretary of Environment delivered her argument before the Court on behalf of the federal government, the City of Buenos Aires, the Province of Buenos Aires, all defendants in this case.

Unlike the litigants of the case<sup>431</sup> and the media, “the public in general” was not invited into the room (“sala de audiencias”) where the Court was to hold the first of a series of hearings in this case. “Your name must be in the Court’s Protocol and Ceremonial Office’s list to enter this room,” a Court Protocol officer informed me as I

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<sup>429</sup> See: “Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río - Matanza - Riachuelo),” CSJN, LL-2006, 281; a lawsuit of original and exclusive Supreme Court’s jurisdiction filed by a group of neighbors of one of the vastly populated industrial urban area in Argentina—the basin of the *Matanza* and *Riachuelo* rivers—that sued the federal government, the province of Buenos Aires, the city of Buenos Aires, and forty-four private corporations that operated in the area for the damages caused by the river pollution.

<sup>430</sup> See Chapter One of this dissertation for a description of the location of this courtroom in particular.

<sup>431</sup> In the days previous to the hearing, the Court had ruled that a few NGOs and the Nation’s Ombudsman were also considered parties of this case, since they held a legitimate interest in it. See: “Mendoza, Beatriz y otros c. Estado Nacional y otros”, CSJN, 329 Fallos 3445 (2006); “Mendoza, Beatriz y otros c. Estado Nacional y otros”, C.S.J.N. 329 Fallos 3445 (2006).



tried to make my way to the fourth floor hearing room. Indeed, I had been told the day before that if I were a mere member of the ‘public’, I could watch the hearing projected onto a screen in the Court of Appeals’ second floor hearing room. Upon finally arriving at the entrance of the screening room, a staff member from the Court’s protocol office directed me to take a seat “only in any of the last three rows.” Looking over the near-empty room, I could not help but be surprised by such a request; I shared my surprise with the Court protocol officer. She, however, replied firmly that the other seats were reserved for both Court clerks and other judicial functionaries; hence, those who were not judicial functionaries and wanted to watch the hearing had been assigned to the rear of the screening room.<sup>432</sup>

As with other encounters with Court administrative staff during my fieldwork, I noticed these officers playing on personal notions of public space to pose limits to my field setting. This hearing, a very infrequent event in the Court’s calendar, provided a unique opportunity to see the enactment of these notions at work. On this occasion, the protocol office personnel that I encountered not only interpreted the category of “the public” through the instrumentality of the office’s listing,<sup>433</sup> but also in more political terms, for instance excluding the Court from the outsider’s gaze.<sup>434</sup> Indeed, that was the reaction I got when I was not allowed to take photos either on the fourth floor, outside the courtroom, or once the hearing was finished. A Court officer

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<sup>432</sup> A week later, however, on the date of the second public hearing in the case, I was able to access the Court’s hearing room accompanied by one of my informants--a high-ranking judicial functionary whom I ran into by chance while trying to access the Court’s hearing room.

<sup>433</sup> See: Supreme Court bylaw for public hearing in “Mendoza, Beatriz y otros c. Estado Nacional y otros,” C.S.J.N. 329 Fallos 3445 (2006).

<sup>434</sup> Notably, Latour accounts for similar kinds of reactions within the French *Conseil d’État*: “The Conseil d’Etat is not a public place, but while the court is in session the public is admitted to certain areas at certain times. Ushers and receptionists police the otherwise invisible distinction between those places which are open to the public and those (rather than numerous) places which are reserved for the work of the *conseillers*, for their offices, and for the absolutely secret process of deliberation.” Bruno Latour, “Scientific Objects and Legal Objectivity” in *Law, Anthropology and the Constitution of the Social: Making Persons and Things*, Alain Pottage & Martha Mundy, eds. (Cambridge: Cambridge University Press, 2004), 73-114, 74.

stopped me and warned me not to take photos on the fourth floor (the floor that houses the majority of the Court's operations). I then replied that it (the building) was a public building; to which he responded: "yes; but not the fourth floor."<sup>435</sup>

In the first chapter of this study, I draw on my own experience of accessing the Court to explain, through an ethnographic example, how the notion of place is implemented in the Argentine Supreme Court. I have found a working parallel between the aesthetics and politics of the notion of place within the Court and the intricate path toward the practices of judicial adjudication. The place—the Court's building—enacts a set of relations that in my account mirror the process of reaching the Court.<sup>436</sup> In this context, I take the protocol office staff's attitudes toward my queries during these hearings as displays of the conception of place that I have encountered in the Court. In the present chapter, however, I want to shift my focus away from these organizations of place, and towards the nature and function of technical tools such as hearings and other instruments of judicial procedure. As I mentioned earlier in this dissertation,<sup>437</sup> working on this technical dimension of law implies not only turning these actual tools of legal knowledge themselves into objects of inquiry, but also using them as a means to advance the knowledge of my subject. Ultimately, I hope that my present appeal to the aesthetics of legal forms contributes to an understanding of the workings of the judicial institution by bringing to the surface the commitments and practices of the subjects that make up the institution.<sup>438</sup>

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<sup>435</sup> Fieldnotes, September 6, 2006.

<sup>436</sup> Adam Reed presents a thoughtful account of the palpable connection between place and relations in his ethnography of the Bomana prison in Port Moresby. See: Adam Reed, *Papua New Guinea's Last Place, Experiences of Constraint in a Postcolonial Prison* (New York: Berghahn Books, 2003). See also Chapter One of this dissertation.

<sup>437</sup> See the introduction to this dissertation.

<sup>438</sup> This draws on Annelise Riles's larger insight that the forms of bureaucratic practices are themselves objects of anthropological knowledge while contributing to an understanding of contemporary institutional knowledge. Annelise Riles, *The Network Inside Out* (Ann Arbor: Michigan 2001), 16-17.

### *The aesthetics of hearings*

In modern legal theory and practice, hearings are a settled instrument of adjudication. Regardless of the system of civil procedure we focus on—either a more lawyer-dominated procedure, such as the American civil system, or other procedures in which the bench exercises greater responsibility in fact-gathering, such as the Continental tradition<sup>439</sup>—hearings are defining features of judicial decision-making. Black’s Law Dictionary provides a general definition of a hearing as “a judicial session usually open to the public, held for the purpose of deciding issues of facts or of law, sometimes with witness testifying.”<sup>440</sup> Underlying this basic and introductory definition are the notions of hearings as tools of knowledge construction, as the means to an end.<sup>441</sup> In a more epistemological sense, Foucault finds the right to testify—the right to oppose truth to power (“to oppose a powerless truth to an untruthful power”)—central in the development of the Greek democracy. This right, he argues, paved the way for several cultural forms central to Western society, all inherited features from the Greeks: the rational systems of proof and evidence (central in philosophy and science); the art of persuasion (proving one’s point through rhetoric); and the development of a new kind of knowledge (knowledge through testimony, memories, or examination).<sup>442</sup>

Hearings are also said to facilitate the interaction between the parties of a case and the judge or judges who have to decide it: “they bring about *immediacy* between the judge and the litigants,” a Court Justice pointed out to me.<sup>443</sup> Not incidentally, this

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<sup>439</sup> John H. Langbein, “The German Advantage in Civil Procedure,” *The University of Chicago Law Review* 54: 4 (1985): 827-866.

<sup>440</sup> Black’s Law Dictionary, Second Pocket Edition, Bryan A. Garner, ed. (St. Paul, MN: West Publishing Co. 2001), 317.

<sup>441</sup> “Advocacy is not an end in itself, it is the means by which the judicial process attempts to arrive at truth and justice,” Irving R. Kaufman, “Appellate Advocacy in the Federal Courts” *Federal Rules Decisions* (1978): 165-172, 172.

<sup>442</sup> Michel Foucault, *La verdad y las formas jurídicas* (Barcelona: Gedisa, 2005), 66-7.

<sup>443</sup> Interview, May 17, 2006.

Justice was a former criminal judge. In Argentina, whose civil procedure system draws on a marked tradition of written (and usually faceless) procedure,<sup>444</sup> such immediacy is usually praised as an advantage—and a guarantee—of criminal procedure *vis-à-vis* civil procedure.<sup>445</sup>

The Argentine Civil and Commercial Procedure Code defines hearings as “procedural acts,” and devotes a short chapter to describe the general rules applicable to them.<sup>446</sup> Unlike lower courts whose decision-making processes are ruled by either the Civil, or Criminal Procedure Codes, the Supreme Court’s adjudication processes (both judicial and administrative)<sup>447</sup> are governed by its own bylaws (“Reglamento Interno”)<sup>448</sup> At the Court level, the practices, meanings and perceptions of the hearings I encountered were disparate—if not personal. Take, for instance, the Justice I just mentioned above: at the time of our first encounter, she expressed her concern about the absence of public hearings at the Supreme Court level, which, in her view, unfortunately prevented the Justices from establishing contact with the parties concerned in a matter before the tribunal.<sup>449</sup> Nonetheless, when I mentioned this proposal to a few Court clerks, all of them rejected the idea of the Court holding public hearings, arguing that the Court’s current case load would give no room for public hearings.

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<sup>444</sup> See, e.g.: John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (Stanford, CA: Stanford University Press, 1985).

<sup>445</sup> For an analysis of the introduction of plea bargaining in the Argentine Criminal procedure, and thus, its alleged shift from an inquisitorial (continental) to a more adversarial (American) system, see Maximo Langer, “From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure,” *Harvard International Law Journal* 45 (2004), 1-45.

<sup>446</sup> See: the Argentine Federal Code of Civil and Commercial Procedure, Title III, Chapter III . It is also worth noting that judges can delegate their duty of conducting hearings to the court “secretarios” (judicial functionaries). *Ibid.*, section 38 (5).

<sup>447</sup> See Chapter Two of this dissertation.

<sup>448</sup> The Court’s internal bylaw is actually a composite of written norms and customary practices.

<sup>449</sup> Interview, May 17, 2006.

Although the Court's practice has traditionally rejected any sort of public hearing, it has developed several alternative models for hearings. These actually are private meetings between a Justice<sup>450</sup> and a litigant in a case, rather than "hearings" in the definition expressed by the procedural code—yet any meeting with a Court Justice is assumed to be a hearing, even if you simply want to ask the judge a few questions for your research project. These meetings have become an extended institutional practice, to the extent that while asking my informants to address the topic of hearings, they almost instinctively—and many times defensively—assumed that my query about hearings was actually a question about the private meetings that a Justice or clerks may hold with a litigant.<sup>451</sup> The reason is that these private hearings are pejoratively called “alegatos de oreja” (“ear argument”),<sup>452</sup> in the Argentine judiciary jargon, in reference to the counsels' willingness to deploy all kinds of strategies to persuade the judges or clerks to issue a favorable decision.<sup>453</sup> These hearings, among other practices, were targeted by a series of so-called “transparency bylaws” (“acordadas de

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<sup>450</sup> Moreover, Justices have traditionally deferred these hearings to their clerks. The Court clerks (*secretarios*) also can hold these meetings, as I noted above.

<sup>451</sup> As an experienced legal practitioner, Alejandro Carrió gives a brief account of the importance for attorneys of holding these meetings and how they became a common practice in the Court: “Los abogados litigantes saben de la importancia de que el titular de la Secretaria donde el expediente ha quedado radicado, entienda—y si es posible comparta—los argumentos brindados en oportunidad de presentar recursos o peticiones que la Corte debe tratar. Eso ha hecho que se vuelvan comunes los pedidos de audiencia para “ver” a un determinado secretario, con la esperanza de que un alegato oral impresione mejor, o sea más persuasivo, que el árido recurso escrito que el mismo litigante ha presentado ya.

Con el tiempo los Secretarios del Tribunal se han ido volviendo, para fortuna de los abogados, mas abiertos a escuchar argumentaciones en apoyo de una determinada posición en el conflicto. Eso sin duda no era así en los años en que yo empecé a litigar. Con Secretarios como los Dres. Brea o Divito, la mayoría de los abogados deben haber batido records de mínima permanencia ante un funcionario judicial. La “charla”, si así cabe llamarla, se limitaba a un intento de argumentación rápidamente cortado por un parco “estudiaremos su recurso, doctor”, con lo que claramente se terminaba la entrevista.” Alejandro Carrió, *La Corte Suprema y su Independencia* (Buenos Aires: Abeledo Perrot, 1996), 27.

<sup>452</sup> The expression “ear argument” is probably the most accurate image to convey that the parties' oral arguments are delivered directly and privately to the judge or the clerk. I thank Mariana Valverde for suggesting this expression to me. E-mail message to author, June 19, 2008.

<sup>453</sup> See e.g.: “Fin de los alegatos de oreja”, *Fojas Cero*. La página de los abogados argentinos 136, <http://www.fojas0.com/FC136Alegatos.htm> (last accessed October 15, 2007).

transparencia”) that the Court issued in 2003-4. The Court ruled that Justices would not hear the arguments of a litigant without all the parties of the case being present.<sup>454</sup> Remarkably, in response to my query on the reception of that bylaw within the Court, a Court clerk (*secretario*)<sup>455</sup> pointed out that even though it was being obeyed, he found that rule somewhat unfair since the new norm affected the situation between the parties of the case, giving a *de facto* veto power to the party not interested in having the Court hear the case.<sup>456</sup> I will return to the implications of the enactment of these transparency bylaws later in this chapter.

The effect of those hearings on my informants (clerks) cannot be assessed, at least not in general terms, since each clerk experiences hearings in different ways. In one of my first interviews at the Court, a Court clerk told me he was bound by the Court bylaws to meet with all the litigants and/or their counsels, and that listening to them can help him either to confirm his previous idea on the case or to anticipate his [the clerk’s] reading, or, in his words, “just to make it [the case reading] simpler.”<sup>457</sup> On the other hand, he said it was not clear to him to what extent a hearing helped counsel and clients advocate their case, although he acknowledged that, “it might be that seeing the person who will decide the case face-to-face or the person who will collaborate in the decision-making would make a difference for them”<sup>458</sup> A few months later, another Court clerk confessed to me that he usually was annoyed when,

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<sup>454</sup> Supreme Court bylaw No. 7, February 24, 2004, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed September 16, 2007). Annelise Riles accounts for a similar policy implemented by the Bank of Japan, her field site, in response to the discourse of accountability in the press and among bureaucrats themselves: “Every meeting with clients would have to be cleared in advance with a manager and documented after the fact... Yet, under the new policy, contacts with market participants were limited to office meetings that produced formulaic answers to predetermined questions and in which the parties did not feel free to make quiet requests from favors or compromises...” Annelise Riles, “Real Time: Unwinding technocratic and anthropological knowledge” *American Ethnologist* 31: 3 (2004), 332-405, 396.

<sup>455</sup> For a description of the scheme of labor within the Supreme Court, see Chapter Three of this dissertation.

<sup>456</sup> Interviews, October 25, and November 2, 2005.

<sup>457</sup> Ibid.

<sup>458</sup> Ibid.

in the course of the hearings with the parties or/and their counsels, they asked him “to please read the file.” “Of course we read the files! How can they believe that we do not read the files?” he said to me.<sup>459</sup> In another interview, a Justice's clerk told me that the fact of meeting counsel “did not add any useful information for [her] to decide the case.” Rather, she said, counsels only use the space of these encounters to repeat the content of the file, “to repeat what is already written.”<sup>460</sup> To my question whether she was able to ask counsels more precise and detailed questions that might orient her reasoning and decision, she responded that she did not ask anything during the hearings. On the contrary, she only listened to her interlocutors’ speech.<sup>461</sup> Like other clerks I interviewed, she found these meetings—entertaining the parties of case—as a deviation from proper judging (bureaucratic) practice,<sup>462</sup> this understood as “the procurement and dissemination of knowledge on a rational basis.”<sup>463</sup>

Hearings may work as instruments of knowledge construction, as tools for reaching the legal truth, as acts that validate a formal procedure, or, they can assume other different and even personal meanings, as my informants’ accounts just showed. But, more importantly, hearings may also be understood as objects of performance. A vast law review literature on the value of oral arguments before appellate courts in the United States illustrates this point.<sup>464</sup>

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<sup>459</sup> Interview, December 16, 2005.

<sup>460</sup> Interview, June 22, 2006

<sup>461</sup> Ibid.

<sup>462</sup> Interview, August 2006.

<sup>463</sup> See Annelise Riles, “Real Time,” 396.

<sup>464</sup> See, e.g.: Robert H. Jackson, “Advocacy Before the United States Supreme Court,” *Cornell Law Quarterly* 37:1 (1951-1952): 1-16; William H. Rehnquist, “Oral Advocacy: A Disappearing Art,” *Mercer Law Review* 35(1983-1984): 1015-1028; Robert J. Martineau, “The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom” *Iowa Law Review* 72 (1986): 1-33; Lawrence W. Pierce, “Appellate Advocacy: Some Reflections from the Bench” *Fordham Law Review* 61 (1993): 829-841; Ruth Bader Ginsburg, “Remarks on Appellate Advocacy” *South Carolina Law Review* 50 (1999): 567-615; Seth Waxman, “In the Shadow of Daniel Webster: Arguing Appeals in the Twenty-First Century” *Journal of Appellate Practice and Process* 3 (2001): 521-531; Mark R. Kravitz, “Words to the Wise” *Journal of Appellate Practice and Process* 5 (2003): 543-549.

[...] we might liken [oral arguments before an appellate court] to the passing parade, with judges and litigants functioning simultaneously as participants and as interested spectators watching from opposite sides of the street. The sense of immediacy and involvement—the three-dimensional experience—one gains from such a proceeding is specially important to the judges<sup>465</sup>

Within this legal literature, oral advocacy before the Supreme Court has been defined as an “art,”<sup>466</sup> an “essential art,”<sup>467</sup> and even as the art of “building a cathedral.”<sup>468</sup> As such, it requires specific techniques and advocate’s very best performance—this latter probably embodied in Daniel Webster’s delivery of oral arguments in *Gibbons v. Ogden*.<sup>469</sup> Yet, as object of performance, hearings may be turned into political tools. To support this argument, I return to my account of the public hearing of the *Riachuelo*.

The public who had watched the hearing broadcast live in the improvised screening room began to gather at the room’s front door to exchange opinions about the arguments delivered by the defendants.<sup>470</sup> I noticed that for many of the attendees, in particular for the neighbors of the *Riachuelo* area, the arguments they had just heard were very provocative, in particular those delivered by the Secretary of Environment. I then approached a group of them who also happened to be grassroots activists (“unemployed female members of the unemployed workers’ movement,” as they

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<sup>465</sup> Rehnquist, “Oral Advocacy: A Disappearing Art,” 1022.

<sup>466</sup> Ibid. 1015; Waxman, “In the Shadow of Daniel Webster,” 522.

<sup>467</sup> Bader Ginsburg, “Remarks on Appellate Advocacy,” 570.

<sup>468</sup> Jackson, “Advocacy Before the United States Supreme Court.”

<sup>469</sup> 22 U.S. (9 Wheat. ) 1 (1824). See, for instance, Sandra Day O’Connor’s Milton R. Konvitz Lecture in American Ideals (delivered at Cornell University, October 23, 2007).

<sup>470</sup> Of particular interest were the arguments delivered by the Secretary of Environment on behalf of the three levels of governments involved in the case. September 5, 2006



introduced themselves)<sup>471</sup> to get their reactions on the event we all had just attended. I began asking about their opinions of the hearing. These women, showing a strong political commitment, promptly responded that it was the same old thing: “They [the government] always make the same promises. We heard the same speech fifteen years ago.” I then rephrased my question, inquiring this time about their assessment of the Court’s handling of this case: “But what do you think about the Court’s attitude toward this case?” I asked, noticing a shift in their attitudes as they responded to my new question. “The Court has a clear knowledge [about this issue]” (“la Corte la tiene clara”), one of the women responded to me while her fellows affirmed the response.<sup>472</sup>

In their account, the public hearing showed them that the Court was handling this case in a fair and innovative way, revealing the tribunal’s deep knowledge about the issues at play—they had seen the Justices asking the defendants thoughtful and sharp questions about matters regarding the neighbors’ daily life (housing, health, labor, displacement, etc).<sup>473</sup> Interestingly, other people directly involved in this case who I interviewed also emphasized the importance that the Court conduct public hearings in this (their) case. Regardless of their backgrounds (one was a counsel of the plaintiffs’; another, a young environmental lawyer and civil rights activist; a third, the president of a civil association of the *Riachuelo* zone), they all agreed that the fact that the Court had decided to conduct a hearing in their case was indexical of the case’s institutional relevance. Yet it meant something more important to them: that their claim was finally being heard by a government body.<sup>474</sup>

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<sup>471</sup> Interview, September 5, 2006.

<sup>472</sup> Ibid.

<sup>473</sup> Fieldnotes, September 5, 2006.

<sup>474</sup> Interviews, November 22, 2006; December 4, 2006; and December 14, 2006

The hearing was a unique event in different ways. It was infrequent for the Court to conduct public hearings on cases under its revision.<sup>475</sup> Indeed, the procedural rules for this hearing were issued *ad hoc*, two weeks before the event took place<sup>476</sup> (the same rules were applied to the subsequent (4) hearings the Court held on the same case).<sup>477</sup> The provisional nature of the procedural rules matched the uniqueness of the event: as the neighbors' accounts illustrate, the public hearing worked to open the Court and remove it from its usual closed setting. The end result was a public judicial event open to a massive audience. A high-ranking civil servant from the city of Buenos Aires, who had followed the hearing from one of the seats reserved for the representatives of the city government in the fourth floor courtroom,<sup>478</sup> told me that it was the first time in his twenty-odd years of legal practice that he was able to be “in presence of the tribunal”; “it is like you are seeing in person what you have always read in the texts,” he said to me; “to see the Justices come in the hearing room and that all of us have to stand up, that is stunning ... it was a sober ceremony.”<sup>479</sup> On a personal level—as an individual with a specific research interest in the Court's

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<sup>475</sup> Though the Court had held hearings on a few other occasions, for instance in the so-called “Verbisky” case, the public advertising of the call for hearing on this opportunity, the media coverage of the event, as well as the bureaucratic steps taken within the institution toward its ultimate realization, lent this first hearing an unusual character. “Verbisky, Horacio s/ hábeas corpus”, C.S.J.N. 328 Fallos 1146 (2005).

<sup>476</sup> See: “Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza-Riachuelo)”, CSJN, August 30, 2006, <http://csjn.gov.ar/documentos/verdoc.jsp> (last accessed October 16, 2007).

<sup>477</sup> A sixth hearing on the case was held on October 31, 2007. See: “Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza-Riachuelo)”, C.S.J.N. 330 Fallos 3663 (2007).

<sup>478</sup> The Court decision that set the rules for the hearing in the *Riachuelo* case, also assigned a fixed number of seats for the plaintiffs, the defendants (three units of government and private corporations) and third interested parties. See: Supreme Court bylaw for public hearing in “Mendoza, Beatriz y otros c. Estado Nacional y otros,” C.S.J.N. 329 Fallos 3445 (2006). On November 5, 2007, the Court issued a new bylaw that incorporates public hearings as a permanent Court practice. The norm also classifies the hearing to be held in three different types (*informativa*, *ordenatoria*, and *conciliatoria*), and sets the procedural mechanisms to be followed by both the Justices and those who advocate before the Court. See: Supreme Court bylaw No.30, November 5, 2007, <http://csjn.gov.ar/documentos/verdoc.jsp> (accessed October 1, 2008).

<sup>479</sup> Personal communication, September 11, 2006.

knowledge practices—the hearing certainly expanded my vision of my subject of study by bringing into being new sets of practices and arrangements within the institution; this experience allowed me a vantage point previously unavailable through the fog of the Court’s documentary practices I had accessed so far.<sup>480</sup> The event itself was further evidence that Court was addressing an audience placed elsewhere outside the institution.

This insight is somewhat evocative of the ethnographic categories of “inside” and “outside” the Court drawn from my field, on which I resorted to explain the disparate representations of the Court’s practices gathered in different moments and venues throughout my fieldwork—a move mostly determined by the fluctuant access opportunities I was granted by my informants who worked at the Court. Indeed, the outside emerged as a construct against which to work those informants’ insights of enduring and rule-bound Court’s practices. These categories, however, are not representative of different analytical orders. On the contrary, both are instantiations of the same phenomenon that I address in this dissertation: the Court’s knowledge practices in contemporary Argentina. Thus, by pointing toward “an outside audience,” I mean the Court’s practices that are ethnographically visible through the fictional link between the Court and an outside subject, rather than looking at the institution’s bureaucratic workings—or the other way around: “bureaucratic practices also point again and again to their own incompleteness,” paraphrasing Riles.<sup>481</sup> This is also the

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<sup>480</sup> These everyday practices, however, are not constrained to those interventions that are instinctively associated to the impersonal and interchangeable power of the bureaucratic logic, like signatures, stamps, decrees, certificates, files, etc. See: Pierre Bourdieu, “From the King’s House to the Reason of State”, *Constellations* 11:1 (2004): 16-36, 31. On the contrary, the bureaucracy’s workings I mean here also embrace the cultural manifestations that construct the Court judges’ and other legal bureaucrats’ identities within the judiciary (i.e. the norms of sociability that grant them a special status; the manner in which they talk about their work; their interaction with lower-ranking Court’s personnel; their gathering in professional associations meetings, lunches, seminars; their participation and interaction with colleagues in and through the Court’s documentary practices, like the routine practices of circulation of files and writing of legal memoranda, etc). See: Leticia Barrera, “Meeting the Judicial Family” (February 2007). Unpublished manuscript, on file with the author.

<sup>481</sup> Annelise Riles, *The Network Inside Out* (Ann Arbor: Michigan University Press, 2001) 19.

aesthetics of public hearings, in which the presence of the outsider *per se* elucidates the phenomenon.

### ***Crafting Institutional***

The practices I mean herein are made up not only of public hearings, as such described above, but also by a series of bylaws, the aforementioned “transparency bylaws,” and a new communicational strategy.<sup>482</sup> Particularly, the *transparency bylaws* have introduced mechanisms into the Court’s decision-making process that, in both the institution’s discourse<sup>483</sup> and that of its critics,<sup>484</sup> work to render judicial law-making more visible and accessible to the public.<sup>485</sup> These bylaws have incorporated the public announcement of files circulating within the Court;<sup>486</sup> the advanced publication of the scheduled date in which cases of institutional relevance will be decided by the Court;<sup>487</sup> the publication in the Supreme Court Official Reports

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<sup>482</sup> The Supreme Court’s webpage was redesigned by mid-2007. Under a “Welcome” heading, and right after a very brief introduction that indicates that the Court opened its doors in January 15, 1863, the reader finds a citation belonging to Jose M. Guastavino (then Supreme Court’s *Secretario*), in opportunity of the publication of the first volume of the “*Fallos*” collection (the Court’s official reports) in 1864. Guastavino’s words emphasize the need of the Court’s decisions to be available to the public, as Court’s decisions, he argues, not only to affect the people’s lives but also they are a tool for the people to exercise control upon the judges. Following this statement, another paragraph explains that the publication of the Court’s judicial decisions and administrative activity in the Court’s webpage pursues to meet both the republican principle of publicity of governmental acts, and the society’s right to information; all this in the context of the tribunal’s transparent operation. See: <http://www.csjn.gov.ar/>; last visited October 26, 2007. I was quite familiar with Guastavino’s words before seeing them posted in the Court’s webpage. Indeed, I was referred to his statement on several opportunities during my fieldwork—in interviews conducted with civil rights advocates and Court’s law clerks—to the extent that I obtained myself a copy of that from the Court’s archives. Interviews, September 21, 2005; February 8, 2006; and December 21, 2006. See also the recently launched webpage of the Center for Judicial Information (“Centro de Información Judicial”), <http://www.cij.gov.ar/inicio.html> (visited December 10, 2008).

<sup>483</sup> By the Court’s discourse I refer here the reasons of the issuing the bylaws, as stated in the text of the norms.

<sup>484</sup> For instance, NGOs, civil rights activists, progressive liberal scholars. See: the introduction and Chapter Three of this dissertation.

<sup>485</sup> See, generally: Asociación por los Derechos Civiles, *La Corte y los Derechos, Un informe sobre el contexto y el impacto de sus decisiones durante el periodo 2003-2004* (Buenos Aires: ADC/Siglo XXI Editores, 2005).

<sup>486</sup> See: Supreme Court bylaw No. 35, December 11, 2003,

<http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed July 15, 2007).

<sup>487</sup> Supreme Court bylaw No.36, December 18, 2003, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (July 15, 2007).

(*Fallos*) of the complete versions of the Court's most relevant decisions;<sup>488</sup> the updating of the Court's data bases, and the improvement of the conditions for the public access to the Court's case law,<sup>489</sup> as well as of the content of and the access to the Court's web page;<sup>490</sup> the prohibition for the Justices to hear one of the parties' arguments in private without the presence of the counter-part;<sup>491</sup> the implementation of the *Amicus Curiae* mechanism in cases of "institutional transcendence" or "of interest of the public";<sup>492</sup> the creation of a judicial information center;<sup>493</sup> the public delivery of oral arguments before the tribunal,<sup>494</sup> etc.

As these bylaws were being implemented, four new Justices were appointed (out of the seven who currently preside on the bench), which meant a substantial

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<sup>488</sup> Supreme Court bylaw No. 37, December 18, 2003, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed July 15, 2007).

<sup>489</sup> Ibid.

<sup>490</sup> Supreme Court bylaw No. 1, February 11, 2004, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed July 15, 2007).

<sup>491</sup> Supreme Court bylaw No.7, February 24, 2004, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed July 15, 2007).

<sup>492</sup> Supreme Court bylaw No. 28, July 14, 2004, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed July 15, 2007).

<sup>493</sup> Supreme Court bylaw No.17, May 30, 2006, <http://www.csjn.gov.ar/documentos/verdoc.jsp> (accessed July 15, 2007). See also: La Nación, "Crean un centro de información judicial," November 2, 2006, 13; Clarín, "Crean un Centro de Información Judicial", April 19, 2007, <http://www.clarin.com/diario/2007/04/19/elpais/p-01303.htm> (accessed July 15, 2007).

In the context of the collaboration agreement signed by the Supreme Court and the Press Association of Argentina (Asociación de Entidades Periodísticas de Argentina-ADEPA), on September 5, 2007 the major Argentine newspapers published a four-page supplement entitled "Fallos de la Corte al alcance del ciudadano" ("The Court's decisions available to the citizen") with information about the most recent and relevant 2006-2007 Court's decisions (i.e. due process; judges' salaries, economic emergency, urgent needs, impeachment of Supreme Court's Justices and lower court's judges; environment protection; consumers and users' rights; equal protection in the access to public service; pension funds; human rights; electoral law). On the front cover, there is a short article about the Court after the crisis by the Association for Civil Rights (ADC), followed by photos and short bios of the seven Justices. On the back cover, there are two short articles "Society, Law and Justice," by the President of the Press Association; and "The Court and the democratic Dialogue," by a constitutional law scholar. On the bottom half, there is chart indicating how the judges voted in each of the cases (10) recounted in the supplement. As it also reads on the supplement front page, the publication is aimed at contributing to bring the Supreme Court's work to the society, communicating its most important decision in a way that can be understood by everybody. See: *Los Fallos de la Corte al alcance del ciudadano*, <http://www.adc.org.ar/recursos/700/Losfallos20delaCortealalcancedelamano.pdf> (last accessed October 26, 2007). In September 2008, a second edition of this supplement summarizing the most relevant Court decisions in the 2007-2008 period was published. See: *Los Fallos de la Corte al alcance del ciudadano*, [http://www.adccorte.org.ar/recursos/392/Insert\\_Corte\\_2008.pdf](http://www.adccorte.org.ar/recursos/392/Insert_Corte_2008.pdf) (accessed October 6, 2008).

<sup>494</sup> See: Adrián Ventura, "Incorpora la Corte las audiencias públicas," La Nación, February 5, 2007, 7.

change in the physical composition of the Court. In this context, the image of an ongoing institutional change in the Court emerged and advanced, significantly, by a rhetoric of change articulated not only by the Court's Justices—particularly, albeit not exclusively, by the recently appointed Justices—but also from opinion-making institutions (for instance, NGOs and the media)<sup>495</sup> and legal experts.<sup>496</sup> As a result of the many new faces and regulations, both the Court's members and the public at large began to call the present Court “the new Court” to distance the current incarnation of this institution from that of the previous years. A recent document issued by the Court's President furthers this idea: after the 2001/2002 crisis that impacted upon the judicial power, deepening its preexisting problems, came a period of “transition,” he

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<sup>495</sup> See: Adrián Ventura, “Habrá juzgados abiertos las 24 horas, anuncio el Juez Petracchi. El alto tribunal impulsará su propia reforma judicial,” *La Nación*, May 15, 2004, [http://www.lanacion.com.ar/herramientas/printfriendly/printfriendly.asp?origen=3ra&nota\\_id=601365](http://www.lanacion.com.ar/herramientas/printfriendly/printfriendly.asp?origen=3ra&nota_id=601365) (accessed July 7, 2007); Irina Hauser, “Cómo hacer que la Corte tenga un peso propio” *Página 12*, October 17, 2004, 2-3; Laura Rommer, “La Nueva Corte. En busca de más transparencia,” *La Nación*, August 14, 2005, Sec. Enfoques, 1-3. See also: Silvana Boschi, “La Corte avanza con la reforma judicial,” *Clarín*, August 18, 2005, <http://www.clarin.com/diario/2005/18/elpais/p-01301.htm> (last accessed July 7, 2007); “Conferencia Nacional de Jueces, Una cumbre para afianzar el rol de la justicia en la sociedad,” *La Gaceta*, March 28, 2006, Sec. Tribunales, 1,3; “Los Jueces intentan protegerse,” *Clarín*, April 2, 2006, 8; “El dedo político está más limitado ahora,” *La Gaceta*, May 14, 2006, [http://www.lagaceta.com.ar/vernotae.asp?id\\_nota=158371](http://www.lagaceta.com.ar/vernotae.asp?id_nota=158371) (accessed July 7, 2007); Silvana Boschi, “La Corte, entre las sillas vacías y el fantasma de la mayoría automática,” *Clarín*, August 20, 2006, 12; Jorge Lanata, “El Gobierno y la Corte Suprema, Será Injusticia,” *Perfil*, September 10, 2006, 18-19; Silvana Boschi, “Aires de cambio para la Corte: Un futuro presidente que ya se muestra en funciones. El santafecino Lorenzetti puso en marcha una serie de anuncios e iniciativas,” *Clarín*, October 14, 2006, <http://www.clarin.com/diario/2006/10/14/elpais/p-02801.htm> (last accessed: July 15, 2007); Adrián Ventura, “Preocupa a la Corte que Kirchner sume tanto poder. El tribunal aspira a convertirse en un referente institucional,” *La Nación*, October 15, 2006, 1, 15; Silvana Boschi, “En la Corte Suprema prometen no hacer lugar a su propia reelección,” *Clarín*, November 5, 2006, 19; “Para Petracchi, terminó uno de los errores mas graves de la historia,” *Clarín*, November 11, 2006, 7; Horacio Verbitsky, “Corte en Confección,” *Página 12*, November 19, 2006, 14-15; Silvana Boschi, “La Corte Suprema, con nuevos aires y menos perfil político,” *Clarín*, December 31, 2006, 16; Adrián Ventura, “Pidió la Corte respeto por la independencia judicial,” *La Nación*, March 28, 2007, [http://www.lanacion.com.ar/politica/nota.asp?notal\\_id=895138](http://www.lanacion.com.ar/politica/nota.asp?notal_id=895138) (accessed April 26, 2007).

<sup>496</sup> See, e.g.: Alberto G. Garay, “Cambios en la Corte Suprema,” *Jurisprudencia Argentina*, I (2004): 1136-1139; Héctor Héctor E. Sabelli, “El final de una etapa. Un panorama de la jurisprudencia de la Corte Suprema en el año 2003,” *Jurisprudencia Argentina* III (2004): 1369-1439; Asociación por los Derechos Civiles, “Reformas Institucionales y la Corte en Números”, in *La Corte y los Derechos, Un informe sobre el contexto y el impacto de sus decisiones durante el período 2003-2004* (Buenos Aires:ADC/Siglo Veintiuno Editores, 2005), 23-41; Héctor E. Sabelli, “Como trabaja la Corte,” *Jurisprudencia Argentina* I (2007): 1163-1171.

argues, which lasted up to 2006. During that period, it was possible to manage the effects of the crisis while continuing with the provision of justice. In turn, all of this prevented an institutional debacle.<sup>497</sup> The present moment, explains the judge, is the period of “institutional reconstruction,” that is, the time for restoring the damaged links between the judicial power and society. But the current moment is also the time for a reassertion and consolidation of judicial power *vis-à-vis* the other (state) powers.<sup>498</sup>

If one looks at the Court’s recent case law, one may also notice that the Court “in this current composition”<sup>499</sup> overruled its previous decisions on cases involving violations of human rights during the last military dictatorship.<sup>500</sup> Likewise, it has assumed a proactive standpoint toward economic and social rights by increasingly admitting cases in which governmental policies have infringed upon these rights, to the extent that some voices—both inside and outside the Court—have found hints of judicial activism in the Court’s behavior.<sup>501</sup>

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<sup>497</sup> Ricardo Lorenzetti, *Políticas de Estado para el Poder Judicial*, 1. <http://csjn.gov.ar/documentos/novedades.jsp> (accessed October 18, 2007). Lorenzetti was elected President of the Supreme Court by his fellow Justices in November 2006, and took office in January 2007. His election was largely anticipated by the media. The day Lorenzetti was elected, the then Court’s president Enrique Petracchi, the Vice-President Elena Highton de Nolasco and Lorenzetti himself showed up to the media and reported the election result. That was the first time that the election of the Court’s President was communicated in that way.

<sup>498</sup> *Ibid.*, 1-2.

<sup>499</sup> I am borrowing here a “formula” usually employed in Court’s rulings. When a Court’s decision places emphasis in “its current composition,” this is a sign of the tribunal’s intention to distance itself from its previous rulings. Interview, February 21, 2006.

<sup>500</sup> The most salient case of the series of Human Rights cases decided by the Court in the last four years has been the so-called “Poblete case,” in which the Court upheld the constitutionality of a law passed by Congress voiding—both retroactively and prospectively—the “due obedience” and “final stop” laws that precluded the prosecution of the crimes committed by the military. See: “Simón, Julio Héctor y otros” C.S.J.N. 330 Fallos 3248 (2005). Also, in July 13, 2007 the Court held unconstitutional the presidential pardon that then-President Menem granted in 1990 to the chiefs of the military *juntas* and other high-ranking military officials who had been prosecuted and condemned for human rights violations during the last dictatorship. This means that all the criminal prosecution procedures that had been closed and archived due to the presidential pardon can now be resumed. See: “Mazzeo, Julio L. y otros,” C.S.J.N., 330 Fallos 3248 (2007).

<sup>501</sup> See, e.g.: Gerardo Young, “La Justicia se involucra cada vez más en políticas sociales,” *Clarín*, August 6, 2006, Sec. Zona, 34-36, The notion of judicial activism, however, has disparate

### *Access, Performance, and the Meanings of Accountability*

Whether in newspaper and magazine interviews, conferences, seminars, symposia, expert gatherings, press conferences, reports, or public hearings, Justices appear themselves as the agents of a change oriented toward a new (Court's) engagement with society. The purpose is to bring the Court to the people or, as a Justice told me, "to humanize it."<sup>502</sup> "Meeting the judges in person brings about a different perception of the judiciary," she said, "it implies a perception<sup>503</sup> of access to justice."<sup>504</sup> Also, "the fact that the people on the street recognize the Justices makes the people confident in the judicial process,"<sup>505</sup> she asserted. I take these activities along with the enactment of the legal documents that incorporated new practices in the Court's decision-making process as artifacts of performance,<sup>506</sup> of exhibition. These are situations in which, to borrow Schener's terms, "participants not only do things, they try to *show* others what they are doing or have done";<sup>507</sup> thus, "actions take on a "performed-for-an-audience aspect."<sup>508</sup> Using verbal and written materials—combined with an active public schedule—Justices display a new "institutionality" while making themselves visible to others as participants—or rather, as the engine—of a new political order.<sup>509</sup>

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interpretations among my informants at the Court. I cannot state that for them it has overall positive implications.

<sup>502</sup> Interview, November 9, 2006.

<sup>503</sup> I want to note that the Justice spoke of perception; she did not speak of access on its own terms. My thanks to Zac Zimmer for this observation. E-mail communication to author, October 23, 2007.

<sup>504</sup> Interview, November 9, 2006.

<sup>505</sup> Ibid.

<sup>506</sup> See: Rolland Munro, "The Cultural Performance of Control," *Organization Studies* 20:4 (1999): 619-640.

<sup>507</sup> Quoted in Munro, "The Cultural Performance of Control," 620.

<sup>508</sup> Ibid.

<sup>509</sup> See, e.g: Irina Hauser, "Los jueces en conferencia," Página 12, July 8, 2007, 19. See, also: Primera Conferencia Nacional de Jueces, *Conclusiones* (Santa Fe, Argentina); Ricardo Lorenzetti, *Políticas de Estado para el Poder Judicial*; Segunda Conferencia Nacional de Jueces, *Conclusiones* (Salta, Argentina), September 6-7, 2007, [www.csjn.gov/documentos/verdocjsp](http://www.csjn.gov/documentos/verdocjsp) (accessed October 15, 2007).



At first sight, the performative practices described above appear as exhibitions or displays aimed at impacting upon the public—these are practices that work to perform and to create a new image of the Court. Law clerks and other legal bureaucrats (with only few exceptions) do not see their everyday practices affected by the “performed” Court—at least they do not give an account of change in their work routines. The above description of these subjects’ attitudes toward hearings would support this argument. In one of my interviews a Justice stressed the idea that the Court needed to turn to simpler discursive practices in its decisions;<sup>510</sup> “the purpose,” she argues, “is that the people understand what the Court says ... [t]hey speak about the Court’s [writing] and I wonder what it is.” She also told me that the Court’s Office of Copies, the office that prepares and releases the final versions of the Court’s decisions, used to edit her prose, until she personally asked them to stop.<sup>511</sup> Perhaps it is not a coincidence that a clerk described that same Justice as “the most rebellious in terms of breaking from the Court’s writing style.”<sup>512</sup>

I am not suggesting that there is no perception of change internally. Indeed, my informants’ discourses (mostly law clerks) drew on the divide between “the new Court” (meaning the Court’s present composition) and “the old Court,” in reference to the Court’s previous composition; and they also pointed to the enactment of “transparency bylaws”<sup>513</sup> as another example of the new Court’s accomplishments. Additionally, during a round of interviews in late 2005, many clerks echoed the

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<sup>510</sup> Interview, February 16, 2007.

<sup>511</sup> Ibid.

<sup>512</sup> Interview, November 2, 2005.

<sup>513</sup> Furthering the idea of “difference” pivotal to this essay, it is worth noting my Court informants’ reactions to my quest on the “transparency bylaws” enacted by the Supreme Court: remarkably, all of them responded to me that these by-laws were the result of the President of the Court’s long-standing concern about making the Court’s law-making practices more transparent. Interviews, October 25, 2005; November 2, 2005; March 3, 2006; March 27, 2003; June 22, 2006; December 22, 2006. On the other hand, a few NGO officers interpreted the new legal mechanisms as the Court’s response to the NGOs own claims of transparency and accountability. Interviews, September 21, 2005; February 8, 2006; November 2, 2006.

comment that it still was too early to make any judgment about the workings of this new Court—a comment that suggested that the clerks did not see themselves as parts of either the old or the new versions of the Court. My observation of lawmaking procedures within the Court revealed the practices of those committed to the Court’s day-to-day routines, like clerks, as a very stable aspect of law. Nonetheless, the implementation of new mechanisms in the Court’s decision-making process, like public hearings, necessarily implies rethinking old bureaucratic proceedings and creating new routines to make those mechanisms work.<sup>514</sup>

What I am arguing, instead, is that these practices—invested in creating an image of the “new Court”—operate much more forcefully at a rhetorical and political level than at level of the mundane practices that I encountered in the Court. A Justice’s comment on the Court’s calling of public hearings in relevant cases (like the *Riachuelo* case) supports this argument: the Justice indicated to me that hearings are aimed at showing the public that the Court really works, that it cares about the issues involved, and that it enforces its decisions.<sup>515</sup> This is also the underlying purpose of the Court President’s document that I cited above. In the judge’s account the (lay) citizen mixes up the notion of “justice” (justice as a value, he explains) with that of “judicial power”; this confusion creates an immense gap between the justice people expect to find when they go to court to claim their rights, and the actual fulfillment (or disappointment) of those expectations by the judicial power. Accordingly, he asserts that it is necessary that the judicial power indicate (to the citizenry) “what it *can do*, and what the other powers *must do*”; as well as to show what the judicial power *do* in the cases of conflicts triggered by omissions or non-compliances on the side of the

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<sup>514</sup> I thank Matias Novoa Haidar for drawing my attention to this important point. Personal communication, July 15, 2007.

<sup>515</sup> Interview, February 16, 2007.

other powers omissions or non-compliances”<sup>516</sup> (*italics added*). Consequently, it is by exhibiting the “new Court” (“a Court that has reassumed its role of a real state power”,<sup>517</sup> “that brings the Court to the people,”<sup>518</sup> “a co-governance body and real check of both the Congress and the Executive”<sup>519</sup>), that the symbolic construction of a novel institution comes into being.

The performative nonetheless has a constitutive power: it is one of the influential rituals by which subjects are formed, contested and reformulated.<sup>520</sup> The role of the performative, argues Janet Borgeson, is to deliver the organized subject.<sup>521</sup> In some way, this argument was made long before by anthropologist Clifford Geertz when he pointed out the metaphysical theater embedded in state ceremonials—specifically, the state ceremonials of classical Bali (Negara) that he studied: “theatre designed to express a view of the ultimate nature of reality, and, at the same time, to shape the existing conditions of life to be consonant with that reality; that is, theatre to present an ontology and, by presenting it, to make it happen—make it actual.”<sup>522</sup>

Performance, indicates organization theory scholar Rolland Munro, is assumed to efface individuality. Drawing on Carlson, he notes that theorists (in particular Erving Goffman) view performance as a practice that “owes more to context and to the dynamics of reception than to the specific activities of the performer.”<sup>523</sup> Indeed, Goffman argues that performance “serves mainly to express the characteristics of the

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<sup>516</sup> See Lorenzetti, *Políticas de Estado para el Poder Judicial*, 2-3.

<sup>517</sup> Interview, November 9, 2006.

<sup>518</sup> Interviews, November 9, 2006 and February 16, 2007.

<sup>519</sup> Interview, March 23, 2006.

<sup>520</sup> Judith Butler, *Excitable Speech, A Politics of the Performative* (New York & London: Routledge, 1997), 160.

<sup>521</sup> Janet Borgeson, “Judith Butler: On organizing subjectivities,” in *Contemporary Organization Theory*, Campbell Jones and Rolland Munro, eds. (Oxford: Blackwell Publishing/The Sociological Review, 2005), 69.

<sup>522</sup> Clifford Geertz, *Negara: The Theatre State in Nineteenth-Century Bali* (Princeton, N.J: Princeton University Press, 1980) 104. I thank Annelise Riles for this observation. Personal communication, November 20, 2007.

<sup>523</sup> See Rolland Munro, “The Cultural Performance of Control,” 622.

task that is performed and not the characteristics of the performer.”<sup>524</sup> In contrast to this, in Munro’s view cultural performance may both create and reproduce the performed order *and* stage a display of self: “artefacts are more than instrumental, they are also expressive. Persons do not act alone; they draw on available materials to ‘show’ where they stand.”<sup>525</sup> Based on his ethnography of Bestsafe—a financial corporation in Scotland—Munro illustrates how his subjects (the corporation’s managers) draw on devices associated with control (i.e. quality initiatives or output charts) to exhibit themselves as members of a group; but also, in Munro’s understanding, the managers draw on these devices not only due to their instrumental capacity, “but because these are indexical to their cultural performance as a ‘doing’ manager....”;<sup>526</sup> hence, he concludes that, “In the performed order of Bestsafe, managerial devices and ethos are never disjunct.”<sup>527</sup>

Drawing on Munro’s insight,<sup>528</sup> I point out now the legal documents, reports, hearings, expert conferences, etc., through which my subjects instantiate the “new Court,” not as mere artefacts of performance, but also as technical interventions that are key devices of judicial decision-making; that is, they make up for adjudication. Also notably, the displays of the “new Court” further a new “institutionality” and render the Justices’ identities visible, thus ratifying the dual capacity of performance, as in Munro’s account: as both exhibition of membership and display of the self.

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<sup>524</sup> Erving Goffman, *The Presentation of Self in Everyday Life* (Garden City, NY: Anchor Books, 1959) 77.

<sup>525</sup> Rolland Munro, “The Cultural Performance of Control,” 624.

<sup>526</sup> Ibid. 637

<sup>527</sup> Ibid.

<sup>528</sup> Munro’s larger insight in this work is the relation between culture and managerial control. He explores the connection between culture and control by looking at the mundane managerial practices exhibited by his subjects—in his research setting control is performed not by rationalistic instruments but through cultural artifacts, like access, morale and delivery. He makes it clear, though, that this cultural turn in organization theory does not suggest that control and intervening are driven *through* culture; rather, all practices are mediated by cultural phenomena. The cultural ‘turn’ in organization theory, he explains, means that “there are no symbols that speak of ‘culture’ alone. Instructions, commands, and the like, all require cultural material to be made ‘visible’ and ‘available.’ ” Ibid, 633.

In the context of this “performed” Court, the figures of the Court as an institution and that of the Justices who sit on the bench, appear as interchangeable. This relation is suggested in the aforementioned Justice’s utterance “that the people on the street know who the Justices are”; or, paraphrasing another Supreme Court Justice: “the [Court’s] openness, the publicity of hearings, make things simpler for the lay people to understand what the Court does; we don’t want the people to believe that the Court does not do anything.”<sup>529</sup> The Court President’s aforementioned document may also be taken as a manifestation of the same phenomenon: the Justice drafted a document on “state policies for the judicial power” (“Políticas de Estado para el Poder Judicial”), although he made it clear that he bore personal responsibility for the proposed policies since the document had not been institutionally approved.<sup>530</sup> However, it is worth noting that the document is published and available at the Supreme Court webpage. Similarly, the law clerks who deferred evaluating the actions of this ‘new Court’ may be interpreted along the same way: in their accounts, the notion of the Court as an institution merges with the individual Justices.

Munro’s insight also notes performance as an activity integrated to everyday life. Accordingly, he distances himself from theorists like Singer, Hymes and Bauman, who exclude everyday life from the notion of cultural performance, and points to Cohen’s argument about cultural processes as part of the mundane and everyday experience of life (rather than rare and formalized procedures).<sup>531</sup> Moreover, he draws on Carlson’s view of performance as a “border, a margin, a site of negotiation”,<sup>532</sup> thus, rejecting any static concept of performance—like that suggested in Goffman’s account of the scenic parts that constitute the “setting” of the performance (furniture,

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<sup>529</sup> Interview February 16, 2007.

<sup>530</sup> See: Lorenzetti, *Políticas de Estado para el Poder Judicial*, 1

<sup>531</sup> Ibid.

<sup>532</sup> Marvin Carlson, *Performance: A Critical Introduction* (London: Routledge, 1996), 20 (quoted in Rolland Munro, “The Cultural Performance of Control,” 632).

physical layout, decoration, etc.) and the “personal front” (clothing, sex, age, racial characteristics, posture, speech, etc.) of the performer.<sup>533</sup> Likewise, in her account of the tacit performative aspect of power, Butler refuses the notion that the performative is represented in a singular act by an already established subject; rather, she argues that the social performative is one of the powerful and subtle ways in which subjects are called into social being from diffuse and powerful parts.<sup>534</sup>

The Court’s performative practices discussed in this chapter are the sites in which the institution negotiates its own legitimacy—paraphrasing a Court’s Justice, “not the formal [legitimacy] that it has always held, but real legitimacy”<sup>535</sup> (legitimacy, in this account, is defined in terms of public acceptance and trust; or “prestige”, as suggested by the Court President’s document).<sup>536</sup> Moreover, these practices frame the terms through which legitimacy should work: in the context of the “performed” Court, authority and reputation build on technologies of transparency and accountability. Notably, the Court’s achieved visibility also acts as a conduit for the Court’s gaining a new position in the political arena.<sup>537</sup>

Legal scholar Michael Dowdle finds that historically Anglo-American political and legal theory has tended to define public accountability primarily in terms of discrete institutional architectures (elections, rationalized bureaucracies, judicial review, transparency, and “markets” among the most prominent), and that each of

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<sup>533</sup> See Goffman, *The Presentation of Self in Everyday Life*, 17-76. I, however, acknowledge that in my opening description of the public hearing in the *Riachuelo* case, somewhat static and scenic, I might be appearing as suggesting, erroneously, my appeal to a fix notion of performance.

<sup>534</sup> Judith Butler, *Excitable Speech*, 160.

<sup>535</sup> Interview, November 9, 2006.

<sup>536</sup> “El poder judicial no debe perseguir la popularidad, sino el prestigio. Ello significa que la aceptación social no se basa en seguir la opinión de las mayorías circunstanciales, sino en aplicar criterios jurídicos coherentes a lo largo del tiempo.” Lorenzetti, *Políticas de Estado para el Poder Judicial*, 1.

<sup>537</sup> In a lecture on the alleged Supreme Court’s strategic behavior that I attended in August 2007, one of the attendees, an NGO director, gave the following account to the speaker and the audience during the Q&A period: “The Court has realized about the importance of its rulings on cases that are relevant for the society. They help her gain legitimacy in the eyes of public opinion; as well as to increase its bargain power *vis-à-vis* the political power.” Fieldnotes, August 23, 2007.

these architectures developed as exigent responses to various legitimacy crises that have periodically beset Anglo-American governance.<sup>538</sup> In the context of the practices of the Argentine Court that this dissertation addresses, I have found accountability to be the common platform for the “institutional reconstruction” efforts articulated from different actors since the 2001/2002 crisis.

Public hearings, reports, bylaws, legal documents, as enacted by the Court, foster audit practices and the idea of accountability. Also, notably, they are themselves performances of good practices. But, above all, these practices address old critiques of the Court’s lack of accountability in decision-making.<sup>539</sup> I, however, do not want to engage in discussions about whether the Court is accountable or transparent; whether it responds to the critiques of opinion-making institutions; or if it meets the watchdog organizations’ expectations about the openness of judicial decision-making. Nor do I intend to make a critique of accountability *per se*. As Marilyn Strathern indicates, accountability has already been well laid as an object of anthropological inquiry; among other fields, by the “anthropology of the state,” organizations and institutions, globalization, and European studies literatures.<sup>540</sup> I want to note, instead, the association between the (Court’s) pursuit of legitimacy and the displaying of accountability, manifested through the coupling of its performative practices and the practice of transparency.

Critical accounting scholars like Carruthers argue that rational procedures, processes and rules (including formal accounting systems) are both the rubrics that lend organizations their formal structures and help confer legitimacy upon the

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<sup>538</sup> Michael Dowdle, “Public accountability: conceptual, historical and epistemic mappings,” in *Public Accountability, Designs, Dilemmas and Experiences*, Michael Dowdle, ed. (Cambridge, UK: Cambridge University Press, 2006) 1-29.

<sup>539</sup> See Chapter Three of this dissertation.

<sup>540</sup> Marilyn Strathern, “Introduction: New Accountabilities”, in *Audit Cultures, Anthropological Studies in Audit, Ethics and the Academy*. Marilyn Strathern, ed. (London: Routledge, 2000) 1-18.

organization. Drawing on New Institutionalism scholars Meyer and Rowan, Carruthers explains: “Modern Western society privileges a particular form of rationality, and so organizations operating within that cultural context will garner more legitimacy.”<sup>541</sup> He, however, finds that formal organizational structure is in fact decoupled from actual organizational practice; and that organizational structure has much more to do with the presentation of organizational-self than with the things that actually transpire within the organization. In his account, “formal structure is mythical and ceremonial, a kind of window-dressing”<sup>542</sup> (as opposed to an accounting-as-mirror version of accounting that reflects what goes on in the organization).<sup>543</sup> If one were to follow this insight, one then might conclude that legitimacy depends more upon a highly rational appearance than upon reality. Shore and Wright come up with a similar analytical divide, though they draw on a different theoretical approach: they ask about that which the emphasis on institutions’ visible performance conceals. From a Foucauldian approach, they point toward a mode of coercive accountability that embodies a rationality similar to that of the panopticon: “it [the rationality of audit] has become a powerful and pervasive technology, and non-compliance is not an option.”<sup>544</sup> Under the façade of legal-rational practices, audit technologies have created a new regime of control, they argue.<sup>545</sup>

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<sup>541</sup> Bruce G. Carruthers, “Accounting, Ambiguity, and the New Institutionalism,” *Accounting, Organization and Society* 2:4 (1995), 313-28, 315.

<sup>542</sup> Ibid.

In his account of Islamic Banking, Maurer works to show that the analytical distinction between technical and rhetorical, the practical and the ceremonial on which these critical accounting scholars draw cannot be sustained. Nonetheless, he acknowledges Carruthers’s finding of accounting as a linguistic event with a constitutive power. Bill Maurer, “Anthropological and Accounting Knowledge in Islamic Banking and Finance: Rethinking Critical Accounts”, *Journal of the Royal Anthropological Institute* 8: 4 (2002): 645-667, 646.

<sup>543</sup> Ibid.

<sup>544</sup> Cris Shore and Susan Wright, “Coercive accountability: The rise of audit culture in higher education”, in *Audit Culture, Anthropological Studies in Audit, Ethics and the Academy*, Marilyn Strathern ed. (London: Routledge, 2000), 57-89, 76.

<sup>545</sup> Ibid., 57.



In analyzing “audit cultures,” Marilyn Strathern stresses the ubiquity and pervasiveness of the values and practices promulgated in the name of accountability. Indeed, audit cultures—audit regimes—she argues, are parts of a global phenomenon, not confined to one population or type of state apparatus, but rather “compose a field of institutionalized expectations and instruments.” “Transparency of operation,” she explains, “is everywhere endorsed as the outward sign of integrity.”<sup>546</sup> Thus, as Strathern’s insight indicates, the performative practices that I have described in this essay are indeed the local manifestations of a global trend—an aspect that has been generally overlooked by my informants. Nonetheless, it does not mean that there have been no questions in the field about the origins of these practices; but discussion has been focused mainly on whether the “transparency bylaws” and other practices of accountability that the Court implemented were the result of NGO advocacy of transparency in judicial procedures, or whether they responded to the Court’s own perception of how its decision-making practices “ought to be.”<sup>547</sup> Nonetheless, whether developed through internal policies or as the consequence of external pressures, these performative practices discloses a faith-like commitment to accountability’s agentic powers.<sup>548</sup>

### ***Legal Forms and Knowledge Relations***

I would like to conclude by returning to Carruthers’s insight that accounts are indexical and polysemic—like other symbol systems. He argues that accountability

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<sup>546</sup> Marilyn Strathern, “Introduction: New Accountabilities,” 2.

<sup>547</sup> It is worth noting my Court informants’ reactions to my query on the “transparency bylaws” enacted by the Supreme Court: remarkably, all of them responded to me that these by-laws were the result of the President of the Court’s long-standing concern about making the Court’s lawmaking practices more transparent. Interviews, October 25, 2005; November 2, 2005; March 3, 2006; March 27, 2003; June 22, 2006; December 22, 2006. On the other hand, on several opportunities, the staff of different NGOs pointed out that the Court had taken decisions implementing the policies they had previously drafted in documents, reports, public campaigns, etc. Interviews, February 9, 2006; November 2, 2006; September 20, 2007.

<sup>548</sup> On the faith-like commitments to instrumentalization and to the agentic power of forms, see Annelise Riles, “Legal Fictions.” Unpublished manuscript, on file with the author.

may be assumed as furthering different meanings to different audiences.<sup>549</sup> Accordingly, my present account would suggest that different observers interpret the Court's movement towards accountability in different ways: for instance, the neighbors of the *Riachuelo* area may remark that the magistrates have finally begun listening to their claims, whereas for civil rights organizations this same movement towards accountability would provide verification that the NGOs themselves have helped shape the Court's agenda and influenced its decision-making practices. Within the Court itself, the judicial actors may view the movement toward greater accountability as demonstrating their new engagement with society conducive to the Court regaining authority and prestige.

Regardless of how we may interpret these subjects' uses, understandings, and practices of accountability, they altogether bring us back to the focal point of this piece (and the whole dissertation): the aesthetics of legal forms and the relations of knowledge it elucidates. Throughout this chapter, my appeal to this aesthetics has been double: on the one hand, in the above pages I have described a series of the Court's practices that work to render the institution (and the Justices) visible to both particular audiences and to the larger public; and I elaborated on the effects that said visibility brought about. But I have also indicated that these practices are themselves instruments of judicial knowledge. In other words, hearings, decisions, reports and other legal documents are not only familiar to the Court's everyday decision-making process; they have become the instruments that further a new image of the institution as well. On the other hand, I have borrowed those tools of legal and bureaucratic knowledge, and, drawing on the aesthetics of instrumentality similar to those I observed in Court, I worked to advance my own knowledge process.

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<sup>549</sup> See: Carruthers, "Accounting, Ambiguity, and the New Institutionalism," 320.

## CONCLUSION

As I noted earlier in this dissertation, the way law is usually perceived and apprehended in legal analysis is through its very results, its visible ends: a judgment, a decree, a bylaw, an administrative decision, and so forth. Seen from this perspective, judicial decision-making is turned into its outcome: the signed judgment.<sup>550</sup> Even critical and socio-legal studies that focus on judicial reasoning tend to engage themselves in the textual analysis of the decision (a general of a set of decisions, a group of cases) to point to, from the discursive procedure by which rules are made, the ideological content of judgment and hence to infer either the ideological<sup>551</sup> or strategic behavior<sup>552</sup> of judicial decision-makers (judges). In one sense, it seems paradoxical that in seeking to understand how lawmaking works, legal analysis ignores what appears to be lawyers and even legal scholars' ubiquitous understanding of law: a set of relations of means to ends. As Riles notes:

Put into practice as a way of performing legal knowledge, this legal means-ends relation consists of a nesting, cascading set of relations of means and ends. Acts of regulation are means to social ends; the decisions of judges in property cases about the scope of those acts, likewise, are means to particular ends; and scholarly thinking about judicial decision-making constitutes further means to ends. The law is simply the

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<sup>550</sup> See: Mitchel de S.O.-I.- E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2005).

<sup>551</sup> See, e.g.: Duncan Kennedy. *A Critique of Adjudication: fin de siècle* (Cambridge, Mass: Harvard University Press, 1997).

<sup>552</sup> See, generally: Gretchen Helmke, *Courts Under Constraints: Judges, Generals, and Presidents*. (New York:Cambridge University Press, 2005).

aggregation of each of these knowledge practices: in lawyers' conception, the law is a nested set of means and ends, and these are concretized in institutions that themselves are means to another ends.<sup>553</sup>

Throughout this dissertation I have consciously sought to replicate the essence of the instrumental thinking of legal knowledge and ground it in the ethnographic account of the means through which law is made and created in the Argentine Court of Justice. But this is not to say that my description builds upon this pragmatic reading of law that Riles describes. Rather, the notion of means—of law's means—that my account advances lies on more material bases; that is, it examines the practices and techniques of manufacturing, crafting the law. In a sense, I draw on Bruno Latour's insight about court as a "factory" of law. However, at another level of analysis, I borrow from the above orientation of law its aesthetics of instrumentality to turn the objects of lawmaking on which I build my account into analytical tools—thus, the means to advance my own knowledge of the subject. And yet, with this ethnography of judicial practice I seek to contribute to a broader socio-legal debate about the making of law. That is, continuing the chain, this ethnography becomes my own means to intervene in socio-legal theory.

### ***Artifacts of Knowledge***

This dissertation pivot on four artifacts drawn from my subjects' practices: place, documents, subjects and performance. Through the first three artifacts I explore the materiality of lawmaking through the description of a set of documentary practices such as file-making and circulation, the writing of memoranda, gatekeeping, among others, often regarded as merely mundane and bureaucratic procedures in the judicial

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<sup>553</sup> Annelise Riles, "Property as Legal Knowledge: Means and Ends," *Journal of the Royal Anthropological Institute* (N.S.) 10, (2004): 775-795, 783.

practice toward the construction of the final ruling, thus is to say, the material bases for reaching the decision. In contrast to this, the fourth artifact, performance, might suggest at first sight that judicial practice as embodied in the workings of the “new” Court<sup>554</sup> becomes an end itself. This image is reflected by the perception of many of my interlocutors in the Court, and in general fostered by opinion-making institutions (NGOs and the media) about a new institutionality that would emerge as a result of a set of practices and regulations enacted by the Court; in other words, a tribunal more opened to public scrutiny and participation, closer to the people on the street. However, as I demonstrated in Chapter Five, the performative practices displayed at the Court level may enact disparate meanings for different audiences. Public hearings, for instance, taken by these subjects as a symbol of institutional change, are in fact indexical of different uses and meanings of transparency for those who perform the hearings (judges, legal bureaucrats) and those who in some way or another are involved in them, for instance, litigants, government agencies, NGOs. Consequently, a critical assessment of the performative turns these practices into means to an end—an open end yet.

With the notions and senses of place enacted by my subjects’ practices and perceived through my own access to the institution, I recreate my fieldsite, but neither in purely physical nor symbolic terms. On the contrary, the judicial space that emerges from my account questions the commonplace representation of judicial practice as a phenomenon constrained within a delimited site, by pointing toward practices that are seen as external to lawmaking. In so doing, it offers the possibility to rethink the contemporary judicial space, and elaborate on the efforts to negotiate the legal authority triggered from constant disruptions to the juridical order generated by these practices.

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<sup>554</sup> See Chapter Five of this dissertation.

Documents, files, lay at the surface of the bureaucratic practice; they are grounded on the materiality of bureaucracy's working. Indeed, these tools are taken for granted, and thus, ignored as objects of physical examination in legal studies. The cognitive and analytical potentialities of these instruments, however, are obscured precisely due to the familiar and commonsensical way in which we relate with them. Chapters Two and Three described the kinds of documentary practices that I encountered in my fieldsite, in particular among law clerks, and emphasized their mundane and routine character. In Chapter Two I argued that if these practices may appear somewhat disruptive to the course of the ethnographic practice, they are actually the commonsensical reaction that researchers of bureaucracy *should* expect when they access the institution.<sup>555</sup> Bureaucratic knowledge moves on scripted routines (more documents and files)<sup>556</sup> which hold their own progression;<sup>557</sup> but as I demonstrated, these routines are not just mechanical inscriptions of words on paper. Files lay the ground for law's authority and accounts for its everyday operations. Exploring files' administrative capacity, I have noted that they take on a certain agency; they elicit relations of knowledge. Probably, this finding arises more clearly in the description of the Court's practice of gatekeeping, the separation of the cases that are proper for legal attention from those that are considered "garbage." As the materials presented in that chapter show, this practice actually operates as a *fiction* of exclusion that ultimately works as a mode of constructing the tribunal's authority.

And yet, documents can be turned into artefacts of performance, and as such, political tools. In this dissertation, I have argued that even documents of the Court's

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<sup>555</sup> See, generally, Annelise Riles, Introduction: In Response." In *Documents: Artifacts of Modern Knowledge*, Annelise Riles ed. (Ann Arbor: The University of Michigan Press, 2006), 1-38.

<sup>556</sup> Annelise Riles, "The Anti-Network: Global Private Law, Legal Knowledge, and the Legitimacy of the State," *American Journal of Comparative Law* 56 (Summer 2008): 605-630.

<sup>557</sup> Cornelia Visman, *Files: Law and Media Technology*, Geoffrey Winthrop-Young trans. (Stanford, CA: Stanford University Press, 2008).

administration such as bylaws can be re-read as performative practices, both of the institution and persons themselves to advance the agenda of different actors, both inside and outside the Court. As I mentioned above, Chapter Five, specifically, shows how public hearings, themselves instruments of legal knowledge, become indexical of different uses and meanings of transparency for the individuals who participate directly in these hearings as well as for those who in some way or another are involved in them.

For their part, the subjects of legal bureaucracy unfold through the making and material circulation of the documents they create. Looking at these subjects' mundane documentary practices, their drafting of legal opinions, writing of memoranda and reports, and even research, it is possible to draw an appreciation of them that moves beyond other forms of imagined legal bureaucrats; thus, leaving behind ubiquitous characterizations of bureaucratic behavior that draw on dichotomies such as modern/pre-modern, objective/subjective, or stable/erratic. Observing these subjects' practices closely as in Chapter Four's description of the gatekeeping practices, one gets the sense of how difficult it is to apprehend clerks' figures—not to mention their understandings about judicial decision-making—under a sole rubric. Yet, this is also noticeable when these subjects occasionally move *outside* their documentary practice to interact with litigants, counsels, and even the researcher. For instance, as noted in Chapter Five, judges and clerks experience (private) hearings in different ways, according to their personal understandings of this practice—and of judicial decision making.

Nonetheless, in Chapter Three I provided a description of the particular figures of law clerks, often regarded as side actors, in light of forms in which these subjects are rendered visible and cognizable through their own documentary practices. Building upon Marilyn Strathern's insight about how persons become "objectified" in

a commodity-driven economy,<sup>558</sup> I demonstrated that legal bureaucrats, through a similar process of objectification, become apparent to the external observer on a rational and objective basis. This process occurs via the subjects' own interventions in the bureaucracy; that is, through the papers—the documents—they produce. Nevertheless, I also showed that there is another form in which these bureaucratic subjects may appear not as things but as persons themselves, through the personal capacities that the documentary practices actualize. From this perspective, which the practice of adjudication keeps concealed from view, each subject is differentiated as a particular person, and apprehended in her or his specific capacities. This argument builds upon Strathern's description about persons' unfolding as persons act in regard to others in Melanesia's gift-exchange logic.

### ***Two Levels***

This dissertation, therefore, develops two levels of analysis. On the one hand, it describes a more mundane aspect of judicial practice: the workings of the legal bureaucracy; the uninteresting and even boring tools and procedures through which legal knowledge is built up. On the other hand, it lays out another dimension of judicial practice, the performative, in which judicial decision-making is presented through an inside-outside relation. In spite of the fact that these two analyses are temporarily separated in this text, one inevitably permeates the other. But it is necessary to know in the first place how these everyday practices and techniques of lawmaking operate, to come up with the image of the Court's apparatus at work, for instance in the context of a public hearing.

At both levels of analysis, I lay out the sets of social relations that emerge from the practices observed, even from those that work on more routine grounds, such as

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<sup>558</sup> See: Marilyn Strathern, *The Gender of the Gift. Problems with Women and Problems with Society in Melanesia* (Berkeley, CA: University of California Press, 1988).



the subjects' notions and senses of place. People's everyday interactions with the legal apparatus shape the judicial space in ways that challenge both legal bureaucrats' understandings and scholarly representations of judicial practice (and law itself) as a distant and localized phenomenon, removed from other social practices. I cannot help but make connections here between the now canonical gap between "norm" and "reality," advanced by law and society scholarship on the basis that legal and social practices work as two different milieus, and Bruno Latour's denial of such a divide and the Durkheimian view of society on which it is based.<sup>559</sup> In contrast to this, Latour embraces Gabriel Tarde's insight about society not "as a separate ontological domain that can explain everything,"<sup>560</sup> but as the thing itself that needs to be explained, and argues then for a move beyond Durkheim: "the task is thereby to study the heterogeneous elements, such as legal ways of organizing relations and connections, that produce it."<sup>561</sup> In certain way, the enactment of the judicial space that arise out of my subjects' quotidian practices furthers this idea that law is not a field constituted by external forces which can be studied independently, but one of the ways in which the world is articulated and assembled.

Through the concept of performance judicial practice assumes a "staged-for-an-audience" form, as implied in both the requests and efforts to "open up" the Court to the people. However, as I suggested at different moments of this dissertation<sup>562</sup> this inside-outside divide is constitutive of other lawmaking practices that I encountered in my fieldsite, although the image of spectacle, of theater, is certainly more palpable in

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<sup>559</sup> See: Ron Levi and Mariana Valverde, "Studying Law by Association: Bruno Latour Goes to the Conseil d' État," *Law and Social Inquiry* 33, no. 3 (2008): 805-825, 806.

<sup>560</sup> *Ibid.* 806-7

<sup>561</sup> *Ibid.* 807.

<sup>562</sup> See, e.g., Chapters One and Five of this dissertation.

state ceremonials<sup>563</sup> and justice rituals,<sup>564</sup> such as public hearings or the practice of oral advocacy where the Other's empirical presence is necessarily required.

But the need to create the Other in terms of spatial distance is present at both levels. Legal order and authority are permanently challenged through concrete senses of mobility, accessibility, and even of disruption at work within the contemporary judicial space, which are nonetheless "naturalized" by institutional practices that work to re-instate the disrupted order and to reconfigure the proper space of law, and authority. This move, as I suggested, can be perceived in the deployment of fences throughout the premise, which brings into play a dissymmetry between the Court and the public. Moreover, the inside-outside relationship is also activated through the Court's documentary practices, which keep internal deliberation and the subjects who create these documents concealed from view, even though at some junctures these latter figures are rendered visible through their own interventions in the bureaucratic practice. And even the workings of gatekeeping practices at the Court level suggest that if the socio-legal context in which these practices develop makes actual exclusion impossible, this nonetheless can be performed through a fiction that presents exclusion as if it were a fact.

Taking these two levels of analysis together, my investigation has sought to capture the forms and practices of legal knowledge that I encountered and apprehended in my fieldsite, and, building on their own aesthetics of instrumentality—means and ends relationship—to replicate them to produce my own knowledge tools. If legal documents and other practices of lawmaking are the instruments of our subjects' knowledge-making practices, they also may become the artifacts of

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<sup>563</sup> See: Clifford Geertz, *Negara: The Theatre State in Nineteenth-Century Bali* (Princeton, N.J.: Princeton University Press, 1980).

<sup>564</sup> See, e.g.: Ratel, Guillaume. "*Subjects by law: the judicial practices of the magistrates of the parlement de Toulouse (1550-1715)*" (Ph.D. dissertation. in progress, Cornell University).

ethnographic knowledge and the ethnographer's own practices of knowledge-making. The result of this effort, this ethnography, is a fine-grained and different understanding of judicial practice that arises out the analysis of the most commonsensical and routine aspects of lawmaking: the workings of the legal bureaucracy. As this study demonstrates, this material and mundane aspect of the law offers an analytical space from where socio-legal scholarship can orient its inquiry.

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